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AN INQUIRY INTO THE DISCRIMINATORY EFFECTS OF INTERNATIONAL TRADE LAW ON THE DEVELOPING COUNTRIES

by

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled AN ENQUIRY INTO THE DISCRIMINATORY EFFECTS OF INTERNATIONAL TRADE LAW ON THE DEVELOPING COUNTRIES submitted by Mahomed Ali Adam in partial fulfilment of the requirement for the degree of Master of Laws.

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TO FRANCES AND OUR SONS
SIKANDER AND JAMEEL

ABSTRACT

It has been stated many a times that the law relating to international transactions is a developing and changing system. The main purpose of this study is to explore the compatibility of the existing legal order, more particularly in the international commercial field, with the aspirations of the countries of the Third World for economic development. In that context we are essentially confronted with the important question of inherent bias of the present legal system and the problem of its discriminatory effect.

The study specifically attempts to survey this critical aspect of international trade law. It looks at the General Agreement on Tariffs and Trade--GATT, the keystone of international trading relationships. In so doing it reviews the proposal for a generalized system of perferences (in favour of all the developing countries), advocated by the United Nations Conference on Trade and Development (UNCTAD), and the basic tenet of the most-favoured-nation (MFN) principle and the movement towards free trade based on the economic theory of comparative advantage.

Further, such diverse areas of concern as import controls, export restrictions, trade terms like f.o.b. (free on board) and c.i.f. (cost, insurance and freight), commercial letters of credit and bills of lading are discussed. The ramifications of the current demand for the revision of international commercial rules are evaluated.

The conclusion reached is that the legal rules of the international system and system itself reflects the interests of the few developed countries. These rules in the international commercial

field favours the western and northern developed States and in fact discriminates against the many developing eastern and southern nations.

It is clear from the review carried out by the study that the developing countries are intent in altering and expanding the rules applicable in the area of international commercial transactions to cover more fully their concern for rapid modernization. The fundamental problem of evolving a just and equitable relationship between the "haves" and the "have-nots" is the raison d'etre for such efforts. To that end the use of the concept of "collective economic security" portends the future development in this complicated sphere not dissimilar to that applying to the arena of collective security for peace.

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CHAPTER I

INTRODUCTION

This study is concerned with some of the issues involved for the newly independent States in the restructuring of the existing rules applicable to international trade. In so doing, it examines only certain aspects of the law governing international trade. Similarly, in a general way it treats the current demand for the establishment of a new international economic order. On this basis questions, such as whether the established rules are conducive to the aims and objectives of the developing countries in promoting economic modernization need to be answered. In brief, some parts of this study will criticize the current state of the international commercial rules as being biased and in favour of the developed nations.

Since the late 1930s the total world trade volume has increased from $20 billion to $243 billion in 1969.[1] This rise in international trade indicates the significance of this to the international economy. Also, trade policy considerations need to be viewed with those applicable to monetary exchange. The post-war years have been marked by an increasing tendency towards trade interference in the interests of national balance of payments problems. There is little doubt that since the 1962 "Cairo Declaration of the Developing Countries",[2] the emphasis by the countries of the Third World has been placed on trade (as against aid)[3] as the primary instrument for the economic development of the developing countries.

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[1] John R. Stark "International Economic Policy--Perspectives for 1970s" 5 Journal of International Law and Economics 101 at p. 105 (1970-1971).

[2] United Nations Document A/5162, Annex (1962). Also, see General Assembly Resolution 1820 (XVII) 18 December 1962--1962 Yearbook of the United Nations (hereinafter cited as Y.B.U.N.) United Nations Publication Sales No. 63.I.1, at p. 253.

This chapter provides the necessary background to the problems facing the developing countries. The desiderata of the new States is that aid from the developed nations has not been adequate[4] and that the

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[3] In order to assist the developing countries to reach the United Nations Development Decade goal by 1970 of a minimum annual growth rate in aggregate income of 5 per cent, the developed countries were at that time to contribute "financial resources" (foreign aid) equivalent annually to 1 per cent of their national income--U.N. Doc. E/Conf. 46/141, Vol. 1 at p. 44 (1964). UNCTAD II set a goal, reaffirmed by the General Assembly of a minimum annual transfers amounting to 1 per cent of the gross national product of each developed country--U.N. Doc. A/7218 at p. 31 (1968).

[4] For example the flow of capital from developed countries was as follows for:

1961 - O.E.C.D. (Organization for Economic Co-operation and Development) and Japan--$7.8 billion ($3.05 billion came from private investment--two-thirds of this was contributed by other countries besides the U.S.A.; $4.81 billion come from public sources--60 per cent of which was contributed by the U.S.A.; the total European contribution--nearly equally divided between public and private sources--was $3.86 billion--75 per cent of which came from France, Germany, and Britain).

Australia, South Africa and Finland--$80 million Sino-Soviet Bloc--$1.02 billion (commitments to economic grants and credits)--$180 million in actual disbursements.

1962 - O.E.C.D. and Japan $7.7 billion ($4.97 billion from the U.S.A.).

-- John A. Pincus "The Cost of Foreign Aid" 45 Review of Economics and Statistics at p. 364 (1963).

It is observed that annually between 1962 to 1964 O.E.C.D. contributed approximately $8 billion annually. -- Rubin THE CONSCIENCE OF THE RICH NATIONS at pp. 154 - 158 (1966).

Aid commitments in real terms have been estimated by one writer as follows, for 1962 :

[Continued on next page]

overall share of the developing countries in world trade has decreased and it is strongly believed will continue to do so (while that of the developed countries has considerably increased) unless some drastic changes are made. It is within this context that the present rules governing international trade have to be evaluated.

The approaches through which modern economic growth may be achieved have been described usually in terms of "aid" or "trade".[5] Recently there has been a definite importance assigned to trade by the developing countries,[6] particularly since the establishment in 1964 of the

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[Continued from p.2 .]
France--1.32 per cent of gross national product.
U.S.A.--0.66 per cent of gross national product (or 0.55 per cent depending on whether P.L. 480--Food for Peace Program--is valued at world market prices) based on value at American official prices.
Germany, Britain and The Netherlands--0.27 per cent of gross national product of each country.
Japan, Canada and Italy even lower than 0.27 per cent of gross national product of each country.

It was calculated that the total aid commitments of the Western nations of nominally amounting to $7.7 billion--0.82 per cent of their gross national product--were actually worth in real terms only amounting to $5.3 billion (and that, if the United States P.L. 480 exports were valued at world market prices, the total worth in real terms would have been only $4.7 billion).--John A. Pincus op. cit. at p. 364.

It should be pointed out that the growing debt burden (thus accrued) indicated that many developing countries had to (and must continue to do in the future) repay about 50 per cent of all new resources transferred to them towards discharging previous debt obligations--the "burden of debt servicing charges"--U.N. Doc. TD/B/103/Rev. 1 (September 1966) at p. 5.

[5] "Exports of primary commodities account for some 85 per cent of the export earnings of the less developed countries"--Harry G. Johnson, ECONOMIC POLICIES TOWARDS LESS DEVELOPED COUNTRIES at p. 84 (1967).

[6] The General Assembly was convinced that the economic development of the developing countries must be based "primarily" on their own efforts, and affirmed that national efforts to achieve this more

[Continued on next page.]

United Nations Conference on Trade and Development (UNCTAD).[7] However, it should also be pointed out that both "aid"[8] and "trade" are not mutually exclusive and the tendency has been to combine both measures at the same time.[9] Considerable portions of the developing countries' economy is also closely tied to the developed countries.

In their quest for modernization developing countries face an economic task of immense proportions. It is believed that in order to achieve this, the developing countries need to harness, among other things, law as well in the process of rapid economic development. A large part of their law is either inherited or adopted from the developed countries. Some of these legal standards[10]

[Continued from p.3.] rapidly required that developing countries ensure "maximum" expansion of their trade: G.A. Res. 1707 (XVI) 19 December, 1961--1961 Y.B.U.N., U.N.P. Sales No.: 62.I.1, at pp. 191-193.

[7] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, Basic Documents on its Establishment and Activities--U.N.P. Sales No. 66.I.14 at pp. 45-56.

[8] "The less developed countries must modernize their economies by accumulating stocks of "human" capital (in industrial skills, modern technology and entrepreneurial ability) as well as material capital, starting from a low level of virtually every asset. Limited contributions of aid can scarcely have a catalytic effect on these economies, for the process of getting economic development started is bound to be prolonged, expensive, and grossly inefficient by the standards of investment productivity normally applied in developed countries"--Harry G. Johnson op. cit. at p. 3.

[9] Dr. Raul Prebisch in John Carey (ed.) LAW AND POLICY MAKING FOR TRADE AMONG "HAVE" AND "HAVE-NOT" NATIONS The Eleventh Hammarskjold Forum at pp. 60-61 (1968).

[10] George Schwarzenberger "The Principles and Standards of International Economic Law" 117 Hague Recueil 1 (1966 - I). Also, Georg Schwarzenberger "The Most-Favoured-Nation Standard in British State Practice" 22 British Yearbook of International Law 96(1945); Georg Schwarzenberger "The Province and Standards of International [Continued on next page.]

and principles, particularly those pertaining to international trade, seem not to suit the interests of the developing countries.

As far as the law is concerned, some of it has or is in the process of being critically examined by the countries of the Third World. This scrutiny has revealed, according to some observers[11] that not only is the law, in some instances, inappropriate but it is also even inimical to the interests of the Third World. Thus, the developing countries have for some time now sought to change certain aspects of international law,[12] including that applicable to international trade.

As far as the economics of development is concerned, its vital significance was underlined nearly seven years ago by Raul Prebisch, then the Secretary-General of UNCTAD, when he observed in words of utter desperation, that

> *. . . in every country without exception, I refer to the aspiration of the younger generation, of the dynamic elements of the younger generation, of that group of individuals who have ability, talent and a fighting*

[Continued from p. 4.]
Economic Law" 2 International Law Quarterly 402 (1948). F. A. Mann "Reflections on a Commercial Law of Nations" 33 Brit. Y.B. Int. L. 20 (1957).

[11] U.N. Doc General Assembly Official Records, twenty-first session (1966) Sixth Committee, 946th meeting.

[12] See, A. Fatouros "International Law and the Third World" 50 Virginia Law Review 783 (1964); J. Castaneda "The Underdeveloped Nations and the Development of International Law" 15 International Organization 38 (1961); Oliver J. Lissitzyn INTERNATIONAL LAW TODAY AND TOMORROW (1965); Richard A. Falk "The New States and International Legal Order" 118 Hague Recueil 1 (1966-II); S. Sinha NEW NATIONS AND THE LAW OF NATIONS (1967); C. H. Alexandrowicz "Afro-Asian World and the Law of Nations" 123 Hague Recueil 121 (1968); R. Anand NEW STATES AND INTERNATIONAL LAW (1972); F. Okoye INTERNATIONAL LAW AND THE NEW AFRICAN STATES (1972); and P. Jessup "Non-Universal International Law" 12 Columbia Journal of Transnational Law 415 (1973).

> *spirit--in brief, every attribute for rising in the economic and social scale, and who, because of the economy's lack of dynamism and the slow pace of development, are not absorbed into, but remain outside the economic and social process, with a very great sense of frustration. From this standpoint, the differences between a growth rate of 4 or 5 per cent and 7 or 8 per cent is vast. The latter rate is capable of absorbing all these people, while the former will leave them in an increasingly desperate situation. If all the manpower excluded from the modern sector of the economy represents an explosive factor, I would say that the younger generation, the dynamic ones, represents the detonator that can spark those explosive elements.*[13]

Similarly, the United Nations' former Secretary-General, the late U. Thant had warned in like terms that the most critical and the most challenging long-term struggle of this century is the gap between the rich and the poor countries. At that time while anticipating the 1968 New Delhi Second United Nations Conference on Trade and Development (UNCTAD II), he declared,

> . . . *the gap between the rich and poor countries is still getting wider*[14]. . . *is . . . much more basic and*

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[13] Quoted in John Carey (ed.) op. cit. at p. 2.

[14] The developed countries per capita income had been increasing on the average at the rate of approximately $60 per year, whereas the developing countries per capita income had been increasing on the average at the rate of approximately less than $2 per year. In the first half of 1960's total world exports grew at an average annual rate of 7.8 per cent, on the other hand the exports of developing countries, excluding oil exports, grew at an average annual rate of 4 per cent only. While the value of exports of of manufactures from industrialized countries increased between 1954 and 1966 by $65 billion, the increase from developing countries amounted for the same period to mere $3 billion--REPORT OF THE SECOND SESSION OF UNCTAD (NEW DELHI CONFERENCE). U.N. Doc. TD/97, Volume I at p. 431.

Also, the developing countries share in total world exports declined from 21.3 per cent in 1960 to 17.8 per cent in 1969--REVIEW OF INTERNATIONAL TRADE AND DEVELOPMENT 1970--Report by the Secretariat of UNCTAD--U.N. Doc. TD/8/309/Rev. 1 at p. 7.

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> *much more fundamental . . . to . . . the future of the peace and security of the world, than the gulf between East and West . . . in the long run what is much more explosive is the widening gulf between the North and and the South. Unless and until leaders of men and thought realize this aspect, I am afraid to think of the future.*[15]

While the tempo of economic expansion may be increasing in many of the developing countries, the achievements, so far attained, need to be looked at specifically in terms of the compelling urge and need for rapid economic growth[16] in these countries. As pointed out above, the question is not merely of steady percentage growth, but of an accelerated pace of development in order to satisfy the "revolution of rising expectations". Rates of growth which might have been

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Further, the external public debt of the developing countries had increased from $10 billion in 1955 to $117 billion in 1973, and while the debt service payments averaged $1/2 billion annually in the mid-1950's, these had in 1966 increased to $4 million annually--U.N. Doc. TD/97 op. cit. at p. 431 and World Debt Tables, World Bank Documents, December 1975.

Further, between 1960 and 1968, the developing countries exports of manufactured goods grew at an annual rate of 11.6 per cent, which was two and a half times the rate recorded for primary commodities. Despite the success achieved by developing countries in more than doubling their exports of manufactures (excluding metals) to $6.8 billion in 1968, nevertheless, this only constituted a modest 15 per cent in the share of their total exports. Thus, it follows that "Given the concentration of the exports of most of the developing countries in primary commodities for which world demand is growing much less rapidly than for manufactures, and unless the obstacles (tariffs, quotas, and other barriers) to the expansion of manufacturing exports, particularly of product lines in which developing countries have a real comparative advantage, are removed, the prospect is that the share of developing countries in world exports will continue to decline--a reflection of the growing gap between developed and developing countries."--U.N. Doc. TD/B/309/Rev. 1 op. cit. at p.3.

[15] John Carey (ed.) op. cit. at p. 2

[16] To enable the developing countries to achieve the rate of economic growth postulated in the relevant U.N. resolutions, these countries would need additional aid on the scale which is estimated at amounts varying between $5 billion to $20 billion--J.J. Kaplan THE CHALLENGE OF FOREIGN AID at p. 159 (1967).

satisfactory in the past are no longer regarded as sufficient, so that the need for rapid economic modernization must be viewed in this peculiar perspective.

In considering the path of modern economic growth for them, it is clear that the initial question of how to get the whole process started (as well as the factors responsible for such tardy achievements to date) has required and been subjected to a thorough analysis by prominent international economists.[17] For many of the developing countries the Rostowian "take-off" stage[18] may not be the pressing question, but its preconditions would seem to be of vital significance[19] to them so as to achieve a regular growth rate.[20]

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[17] In fact, the General Assembly in its Resolution of 1970 provided a separate section, in the International Development Strategy for the Second United Nations Development Decade, on special measures, in favour of the least developed among the developing countries to enhance their capacity to benefit fully and equitably from the policy measures of the Second United Nations Development Decade--G. A. Res. 2626 (XXV) of 24 October, 1970--1970 Y.B.U.N., U.N.P. Sales No. E.72.I.1 at pp. 319-329.

The criteria recommended for the identification of the least developed among the developing countries were:

(a) $100 or less per capita gross domestic product at market prices;

(b) share of manufacturing in the gross domestic product of 10 per cent or less;

(c) literacy rate--proportion of the literate persons in the age groups of 15 years and more--of 20 per cent or less.

On the above basis, some 17 African, 8 Asian, and 1 Latin American member States of the U.N. were considered to be in that hardcore category. Report of the Secretary-General (IDENTIFICATION OF THE LEAST DEVELOPED AMONG THE DEVELQPING COUNTRIES)--U.N. Doc. A/8459 at p. 2.

[18] W. W. Rostow THE STAGES OF ECONOMIC GROWTH at p. 3 (1960).

[19] Ibid., at pp. 4-36.

A combination of external and internal factors are held to have interfered with the process of economic expansion. One of these, it is maintained, is the fact that a primary characteristic of the developing countries' economies, constituting a serious barrier to their accelerated development, is their low level of domestic savings and capital formation.[21] Another, concerns the deteriorating terms of international trade having as one of its causes the existing laws and practices (alleged to have been developed by Western nations during their period of imperial glory). This latter cause has been criticized as not only impeding economic development, but also to a large extent as being inadequate and anachronistic for present-day purposes.

Reference should also be made to the interdependence between the "haves" and the "have-nots" that past association has forged together. This global relationship has over a period of time, it is cogently argued, created specific international norms which have been generically described by some as "international economic law".[22]

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[20] In fact, the "Joint Declaration of the Developing Countries with regard to the United Nations Conference on Trade and Development" looked at the Conference (held in 1964 in Geneva) to help these countries reach the stage of self-sustaining growth.--G. A. Res. 1897 (XVIII) of 11 November, 1963 Annex at paragraph 1--1963 Y.B.U.N., U.N.P. Sales No. 64.I.1 at p. 172.

[21] Harry G. Johnson op. cit. at p. 3.

[22] This generic term would in fact cover, what Wolfgang Friedmann has called, international commercial law, international trade law, international economic development law, international corporation law, international anti-trust law, international tax law, international maritime law, etc.--Wolfgang Friedman THE CHANGING STRUCTURE OF INTERNATIONAL LAW at pp. 170-1 (1964).
[Continued on next page.]

Given that many of the factors described above pertaining to the actual economic condition of the developing countries are accurate, and on the basis that the establishment of the United Nations Commission on International Trade Law (UNICITRAL) in 1966[23] was correctly conceived, this study attempts to carry out an analysis of the most recent developments in the area of the law of international trade that are specifically relevant to the peculiar conditions of the developing countries. What it proposes to do is to try to review the scope of contemporary international trade law that is most applicable to the concerns displayed by the countries of the Third World.

It might prove useful at this stage to outline the current use of what is understood by the term "international trade law". In the Report presented by the United Nation's Secretary-General,[24] Clive Schmitthoff defines it as the "body of rules governing commercial relationships of a private law nature involving different countries."[25] This accords to a large extent with what was described in the 1964 Hungarian Explanatory Memorandum to the United Nations General Assembly as being "not so much an international agreement on

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[Continued from p. 9.]
But cf: Clive Schmitthoff "International Business Law: A New Law Merchant" 2 Current Legal and Social Problems 129 at p. 130; and Imre Gal "The Commercial Laws of Nations and the Law of International Trade" 6 Cornell International Law Journal 55.

[23] G. A. Res. 2205 (XXI) of 17 December, 1966--UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW YEARBOOK (hereinafter cited as UNCITRAL YEARBOOK) Volume I: 1969-1970, U.N.P. Sales No.: E.71.V.I, at p. 65.

[24] Ibid., at p. 18.

[25] Idem. (Secretary-General's Report on "PROGRESSIVE DEVELOPMENT OF THE LAW OF INTERNATIONAL TRADE" 23 September, 1966--U.N. Doc. A/6396).

rules of conflict of laws as applied by national courts and arbitral tribunals as rather a unification of private law in the field of international trade (e.g., unification of the law of international sale of goods or on the formation of contract)."[26] These definitions as they stand are rather restrictive, particularly as they seem to exclude, not only, conflict rules, but also, such important matters as, international commercial transactions that may be carried out by State and para-Statel organizations and entities, where private law may not be the applicable law. Besides, the exclusion of "public" law completely from the definition has led to some attention being drawn to at least one aspect of that law--that of "elimination of discrimination in laws affecting international trade including the application of the most favoured nation principle"--which it was strongly urged should also be considered as forming part of international trade law.[27]

Recent years have seen partial solutions in this field--mainly in the form of international conventions, commercial customs and practices, or the activity of regionalized uniformity of laws--but the crucial economic problem, that of increased world trade and the dismantling of trade barriers nevertheless still remains. It is with this particular problem foremost in our minds that aspects of the law applicable to international commerce have to be viewed.

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[26] Ibid., at p. 5 (U.N. Doc. A/5728).

[27] U.N. Doc. A/CN. 9/SR4.

This survey commences in Chapter II with a brief account of the sources[28] or origins of the rules of international commercial law.[29] The chapter also cursorily examines the historical development of that law. It is clear that by the end of the nineteenth century there was a demand for uniformity, not only in the conflict rules, but also in the substantive law, due to the diversity that had grown in the application of national laws to commercial matters. Until the end of the nineteenth century the International Law Association was exclusively concerned with this movement of uniformity. Then followed in 1893 the Hague Conference on Private International Law. In the early twentieth century the formation of the International Maritime Committee led to the creation of a number of international conventions in the field of maritime law. The establishment of the League of Nations envisaged, amongst other things, that in fiscal and economic regulations and policy, non-discrimination was to be the basis for the conduct of commercial and financial dealings between the nations of the world. The inter-war period dominated by the Great Depression, excessive protectionism and widespread discriminatory trade practices, saw a number of international conferences in 1922, 1927, 1932 and 1933 attempting to deal with the economic problems of that age confronting the world. Neither the world economic conferences, nor the efforts of the League of Nations achieved real progress. In fact the net result was to increase rather than to decrease trade barriers during this period.

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[28] It might be pertinent for us to indicate what is meant by the term "sources"--a word that has caused enough jurisprudential controversy. Suffice to say that a great deal of literature has been devoted to the examination of this term when applied to legal developments and it can be said to have many meanings which so far do not seem to have acquired a uniform significance for those who use it. But without entering into the controversy and strictly for functional purposes it might well be appropriate, despite previous criticism by Professors Allen (C. K. Allen LAW IN THE MAKING 4th Edition (1946) at pp. 1-2) and Hart (H.L.A. Hart THE CONCEPT OF LAW (1961) at pp. 246-247), to adopt Salmond's original expression "source of law (*fons juris*)" in his two senses of "formal" (those giving to a rule the force of law) and "material" (those from which its substance is drawn such as the statute book, etc.). This "material" source was further sub-divided by Salmond as "legal" those which are recognized by the law itself like statutes, judicial precedent, customary and conventional laws--and "historical"--those which are not so recognized as above but are merely persuasive as, for example, the writings of Pothier, which it was held were based on the '*corpus juris civilis*' of Justinian, which in turn it was maintained were taken from the praetorian edicts.--Salmond on JURISPRUDENCE 11th edition (1957) at pp. 133-134.

[29] Throughout this study "international commercial law" is used interchangeably with "international trade law", though it is conceded that "commercial law" when applied normally has a wider connotation than "trade law" and encompasses "maritime law" as well.

The declarations in the Atlantic Charter and the grand design of the United States and Britain for the post-war world order, in the early 1940s was meant to bring about for all States access on equal terms to the trade and raw materials of the world. These pronouncements in fact became the cornerstone for post-World War II international economic planning. The international economic plans devised as a result by the United States opted for multilateralism and the elimination of all preferential and discriminatory trade practices.

The United Nations Charter gave the organization authority to tackle international problems in the economic, social and humanitarian fields that faced the world community after the ravages of the Second World War. In discharging this responsibility, the United Nations Economic and Social Council (ECOSOC) in 1946 established a Preparatory Committee of the International Conference on Trade and Employment. The outcome of this was the holding in 1947 in Geneva of the twenty-two nation multilateral trade conference (which resulted in the General Agreement on Tariff and Trade--GATT) and in 1948 in Cuba of the United Nations Conference on Trade and Employment (which produced the Havana Charter). When the General Agreement was negotiated, the problem of accelerating the economic development of the developing nations was not looked upon as the central issue. Besides at that time, many of the Afro-Asian states were still in fact under foreign domination.

By 1962 circumstances had changed and the developing countries in the "Cairo Declaration of the Developing Countries" complained and stressed that despite universal acknowledgment of the necessity to accelerate the pace of the development of the majority developing countries, adequate measures had not been adopted. To meet the basic needs of these countries, it was vehemently urged that it was not sufficient just to lay down some rules and principles indicating what had to be avoided in the conduct of international trade, as the argument went, was the case with the General Agreement. For these countries it was essential to determine what had to be done and to formulate a policy of positive action. Further, the developing countries complained that the developed nations did not always comply with the rules and principles of the General Agreement unless it suited them. It was also pointed out forcefully by the developing countries that GATT had not served them the same way as it had the developed nations.

Over time the focus of the new States' discontent has also been directed towards the existing legal framework. Moreover, they believe this framework to reflect the traditional norms evolved by a limited number of Western states and which do not necessarily serve their needs. For them the emphasis is on the need for the law in this field to be responsive to the aspiration of the developing nations. More recently, they have called for the democratization of the legal order to serve their particular economic goals. Also, the developing countries stress that international legal rules should reflect a consensus of the contemporary world community. It is even argued that it is

> *. . . not the function of international law in the second half of the twentieth century to protect the vested interest arising out of an international distribution of political and economic power which has irrevocably changed but to adjust conflicting interests on the basis which contemporary opinion regards sufficiently reasonable to be entitled to the organised support of a universal community.*[30]

This disenchantment by the developing countries played some part in the formation of UNCTAD in 1964. To some extent the same is also true for the call by them in 1966 for the progressive harmonization and unification of international trade law, which led to the establishment of UNCITRAL.

The emergence of GATT as a general code for the conduct of international trade is next briefly described in Chapter III. The orientation of GATT towards a free-enterprise economic system was inherent in its basic provisions, and elements of free-trade theory was supposed to have influenced its formation. The underlying assumption of the GATT tariff system is that imports and exports are to be carried out under a free market-economy. It follows from this that countries that have centrally-planned economies would necessarily have to adapt their trading patterns in order to participate in GATT.

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[30] Wilfred Jenks THE COMMON LAW OF MANKIND at p. 85 (1958).

There are few developing countries that can be said to possess all the attributes of either a free market-economy or a centrally-planned economy.

The fundamental principle of general most-favoured-nation (MFN) treatment--the embodiment of non-discrimination in the General Agreement--is treated in this study in some detail. The central commitment in the General Agreement is the essential obligation to accord MFN treatment. It was firmly believed at that time that the MFN clause was the best means of correcting past errors and upholding non-discrimation and thereby ensuring equality of treatment within the then prevailing free-trade philosophy. But the obligation of non-discrimination and MFN treatment was not considered absolute since exceptions were permitted by the General Agreement. The obligation of "national treatment" within the General Agreement means that imported goods are to be accorded the same treatment as goods of local origin with regard to government regulations and taxation. The question of tariff negotiations needs also to be considered. With successive tariff reductions resulting from the various Trade Conferences or Rounds, the importance of non-tariff barriers gained prominence and called for urgent negotiations for their abolition.

The special provisions in the General Agreement relating to the developing countries need to be evaluated in order to ascertain whether the undertaking of trade expansion in favour of the developing countries has been adequately discharged and whether the measures provided in the General Agreement are consonant with the goals and aspirations of these countries. According to the spokesmen of the developing countries, GATT is essentially a rich man's club, and its rules not fully relevant to their requirements. In their view immediate adjustment of the GATT rules in their favour is imperative for the continued validity of these rules. With this perspective on GATT we are in substantial agreement. Nevertheless, it should be emphasized that this so-called "temporary agreement" is still one of the principal regulating agencies for world trade and the current 1975 trade negotiations in Geneva under the auspices of GATT are of vital importance to the developing countries.

Following upon the discussion on GATT, the rules applicable to import transactions are described in Chapter IV. The post-war international regulation of world trade has its genesis in what economists have termed--policies of "beggar-my-neighbour", pursuit of which it was believed resulted in the virtual elimination of international trade. During this period, quantitive restrictions were viewed as anathema to the orderly expansion of world trade and the General Agreement regarded them as the archcriminal of international trade, requiring in general terms their immediate elimination.

In dealing with import controls our focus is primarily directed at the General Agreement. The General Agreement's intention, it was maintained was to contain precisely formulated legal rules, sometimes termed "contractual", which were to be directly applied. But the General Agreement also contained various exceptions to these specific legal rules, as well as escape clauses. The suitability of some of these legal rules of trade conduct, as well as the question of its effective enforcement by GATT, was a matter of prime importance for the developing countries. The most immediate question for these countries presently is the treatment accorded to them under these specific rules and whether some accommodation can be achieved which would allow them to depart from its strict compliance.

It should be remembered that the General Agreement makes a clear distinction between tariffs and other forms of trade barriers. Tariff concessions were normally to be made at international trade conferences called for that purpose under the principle of reciprocity. These tariff concessions were then to be extended to other Contracting Parties by means of the MFN clause. Non-tariff barriers, according to the General Agreement, as a matter of principle, were to be immediately abolished. However, this never materialized and trade negotiations (under the Kennedy Round and presently under the Tokyo Round) also concerned non-tariff barriers.

The General Agreement sets out in some detail rules applicable to import transactions, prohibiting certain measures and regulating others. The substantive obligations, under the General Agreement, as far as they apply to imports may be divided into: tariff commitments; MFN treatment; and certain obligations pertaining to non-tariff barriers. Thus, quantitive restrictions are generally prohibited, subject to specified exceptions. Other measures, such as those dealing with marks of origin, have special rules. Anti-dumping duties and countervailing duties affecting imports may only be applied in accordance with specified rules.

The General Agreement is replete with provisions that were incorporated as a result of American domestic activites. One such action relates to tariff adjustment (escape clause relief). A party seeking to invoke escape clause relief has to show: (1) imports in such increased quantities, (2) as a result of (a) unforeseen developments and (b) the effect of General Agreement obligations, (3) which caused serious injury or threatened serious injury to domestic producers of like or directly competitive products. It is only after this has been established that a party is free, in respect of such a product, to suspend the obligation (under the General Agreement) in whole or in part or to withdraw or modify any concession granted by it.

Petitions from domestic producers against increased imports, which have made their products non-competitive not only in world markets but in the domestic market as well, have also led to the use of "adjustment assistance". Rather than subsidizing such domestic industries, adjustment assistance in the form of relocation of workers after retraining programmes or the development by domestic firms of different lines of production have been advocated by some specifically for the United States as a policy alternative.

It should be pointed out that the "escape clause" safeguard system found in the General Agreement has been used to a very limited extent in the past and instead there has been widespread use of the so-called "voluntary restraints" programme which has brought about friction in international trade relations. The developing countries attach great importance to the reformulation of the existing safeguard rules. They propose that differentiated and more favourable treatment should be granted to them and that, as a general rule, safeguard measures should not be applied by developed countries to imports from developing countries. They believe the only exception would be in the case of proven actual material injury to domestic production, but any action taken must consider the injury that might be caused to export industries in the developing countries.

In Chapter V the rules applicable to exports are briefly considered. The General Agreement mentions exports in a number of articles. The general rule of non-discrimination and MFN treatment applies to both exports as well as to imports, but this is subject to a number of exceptions. Quantitive restrictions as applied to exports are also prohibited by the General Agreement. The provisions in the General Agreement on subsidies also apply to exports.

As mentioned previously the General Agreement permits exceptions and the general exceptions, as well as the security exceptions, found in the General Agreement equally apply to exports. It is maintained that basically there are three reasons for export restrictions: to protect domestic industries by providing them with less expansive domestic raw materials; to prevent or relieve critical shortages; and to improve the terms of trade.

It should be pointed out that there has recently been a call for the revision of GATT rules and the American Congress has advocated new principles and procedures governing access to supplies of food, raw materials, and manufactured or semi-manufactured products, including rules and procedures governing the imposition of export controls, the denial of fair and equitable access to such supplies, and effective consultative procedures on problems of supply shortages.

Having dealt with the general rules in the General Agreement relating to international trade, certain customary trade terms such as f.o.b. (free on board) and c.i.f. (cost, insurance and freight) are next considered in Chapter VI. The law applicable to them is briefly traced within the Anglo-American common law system. The f.o.b. and

and c.i.f. terms (as a legal term) used in international maritime commerce have been recognized for over a century. These particular terms were not a product of legislation, but were evolved by usages and customs of merchants. Judicial contribution in this area was regarded to have been mainly by way of enforcement interpretation.

It is also clear that certain periods have witnessed an increase in the volume of f.o.b. trade and a decline in c.i.f. trade, while at other times the reverse was true. By the beginning of this century business transactions on c.i.f. terms far exceeded others. However, the First World War led to a scarcity in available shipping space and as sellers were reluctant to undertake the obligation of securing shipping space--in an uncertain market and at variable freight rates--as required under c.i.f. terms, this brought about an increase in the use of f.o.b. terms as compared to c.i.f. terms. During the twenties this shortage abated which resulted once again in the prominence of c.i.f. trade.

The Second World War changed the situation and its aftermath, which saw the emergence of many new national shipping and insurance industries in a number of countries, along with a general shortage of foreign currency, played an influential role in the continued use of f.o.b. contracts. The creation of national shipping and insurance industries meant that buyers in those countries were encouraged to use f.o.b. terms. For some developing countries the use of f.o.b. contracts permitted the preservation of scarce foreign exchange reserves, besides supporting fledgling domestic shipping and insurance industries. It is believed by some that the advent of containerization may have an important effect upon the practical significance of f.o.b. contracts.

As far as development of the law applicable in this area was concerned international action was mainly provided by the International Chamber of Commerce. INCOTERMS 1953 attempted to provide some uniformity in this field.

As for commercial letters of credit discussed in Chapter VII, they have a very ancient heritage. This device of payment in international commerce was encumbered as far as the common law was concerned by the doctrine of consideration and the question of assignability of choses in action. However, despite theoretical difficulties, pragmatic considerations permitted not only a widespread use of commercial letters of credit but also led to its judicial enforcement. The ever-increasing demands of the business world for effective uniformity in banking practices related to commercial letters of credit, led to the adoption of the Uniform Customs and Practice for Documentary Credits (UCP) under the aegis of the International Chamber of Commerce. The adherence by banks collectively in some 175 countries to the UCP can be said to have made some contribution towards the universality of bankers' commercial credits.

It should be pointed out that both the UCP and INCOTERMS 1953 have been developed by the International Chamber of Commerce, a body mainly representing the developed countries and on which the developing countries and centrally planned socialist countries are not adequately represented. It is hardly necessary for us to emphasize the importance of considering the particular position of the developing countries in any further revisions of the UCP and INCOTERMS 1953.

There then follows in Chapter VIII a treatment of bills of lading. The development of the rules governing bills of lading originate in the various national maritime laws and the provisions of the Hague Rules. Since this more or less uniform body of maritime law has been shaped by the developed nations, and most particularly by nations with shipping interests, it may be vested with a bias unsuitable to many developing countries. To the extent that maritime law favours carrier interests over cargo interests, it is inimical to developing countries because, by and large, developing countries do not have substantial merchant fleets. In any event, those countries that do not choose to develop a substantial merchant fleet have an obvious interest in seeing that the law does not discriminate against cargo interests.

The central question is, how should losses arising from the carriage of goods by sea be allocated? Historically, the carrier was absolutely liable for loss or damage to the cargo (whether or not he was negligent) regardless of the cause of the loss, subject only to certain specified excepted perils--the so-called common law exceptions. However, where the loss was caused by one of the common law exceptions, the carrier was still liable if he was negligent or otherwise at fault. Also, in all contracts of carriage by sea, there were certain implied terms (unless expressly excluded) that the vessel was seaworthy and that the voyage would be commenced and carried out with reasonable diligence and without unjustifiable deviation.

Until the 1880s the shipowner's liability was in theory strict. The bill of lading was the basic shipping document, embodying (or evidencing) the contractual relationship between the carrier and the cargo despatcher. With the insertion of provisions known as "exoneration clauses" or "negligence clauses" in the bill of lading or other document, shipowners began to limit contractually the strict liability imposed upon them. The widespread use of the "freedom of contract" principles as expressed in both the common law and civil law systems virtually reversed the position and the carriers came to exempt themselves from practically every liability of ocean carriage.

The struggle between shipowning and cargo interests came to a head by the developments that ensued in the United States and the British Dominions, whose maritime trade at that time depended on British shipowners. The result was the enactment in the United States of the Harter Act, 1893; in Australia of the Sea Carriage of Goods Act, 1904; in New Zealand of the Shipping and Seaman Act, 1908 and in Canada of the Canadian Water Act, 1910 (the so-called cargo shippers' countries) in order to remove the chaos and abuse produced by unlimited "freedom of contract".

It also came to be realized by both the shipowning and cargo interests that further reform was needed which would have to be based on international agreement if it was to be of any practical value to maritime commerce. In 1924 the Hague Rules were the ensuing result.

A demand for the revision of the Hague Rules arose in 1963 as a consequence of two British judicial decisions, coupled with a desire by some countries for a change to keep up with the times after some forty years of those Rules. The 1963 Stockholm draft protocol (generally referred to as the Visby Rules) was the basis of the 1968 Brussels Protocol that amended the Hague Rules.

From the developing countries' perspective the present need for the revision of the Hague Rules being undertaken by UNCITRAL is predicated on the assumption that the current balance of equities favours the shipowners as against the cargo interests. As is clear most of the developing countries fall in the category of cargo interests and therefore the allocation of liability for loss under the Hague Rules has frequently worked to their disadvantage.

> *Dissatisfaction of the developing world stems essentially from the belief that the operation of traditional maritime law (along with other aspects of international trade law) impairs the balance of payments position of developing states so as to insure continued poverty and perpetual under-development in an industrial age.*[31]

In Chapter IX we outline certain tentative conclusions. The adoption by the United Nations General Assembly of the "Charter of Economic Rights and Duties of States"[32] portends the establishment of new rules of a juridical nature, which it is fervently hoped will respond positively to the plight and urgent needs of the Third and Fourth World community.

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[31] Joseph C. Sweeney "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part One)" 7 Journal of Maritime Law and Commerce 69 at p. 73 (1975).

[32] G. A. Res. 3281 (XXIX) 12 December 1974 -- 69 American Journal of International Law 48 (1975).

CHAPTER II

DEVELOPMENT OF THE LAW OF INTERNATIONAL TRADE

1. *HISTORICAL ANTECEDENTS*
   - 1.1 *Ancient Heritage*

2. *MEDIEVAL LEX MERCATORIA*
   - 2.1 *Levantine Influence*
   - 2.2 *Ancient Maritime Codes*

3. *INCOROPORATION INTO MUNICIPAL LAWS*
   - 3.1 *England*
   - 3.2 *Scotland*
   - 3.3 *France*
   - 3.4 *Other European Countries*
   - 3.5 *United States of America*
   - 3.6 *Afro-Asian Countries*

4. *NINETEENTH CENTURY*
   - 4.1 *General*
   - 4.2 *Uniform Laws*

5. *PROGRESSIVE DEVELOPMENT*
   - 5.1 *General*
   - 5.2 *League of Nations Experience*
   - 5.3 *Role of the United Nations*
   - 5.4 *Creation of UNCITRAL*

Overview

This chapter commences with a brief account of the sources or origins of the rules of international commercial law. It also cursorily examines the historical development of that law, describing its reception into the various municipal laws over a period of time. It is clear that by the end of the nineteenth century there was a demand for uniformity, not only in the conflict rules, but also in the substantive law, due to the diversity that had grown up in the application of national laws to commercial matters. Until the end of the nineteenth century the International Law Association was exclusively concerned with this movement of uniformity. Then followed in 1893 the Hague Conference on Private International Law. In the early twentieth century the appearance of the International Maritime Committee (CMI) led to the formation of a number of international conventions in the field of maritime law. The establishment of the League of Nations envisaged, amongst other things, that in fiscal and economic regulations and policy, non-discrimination was to be the basis for the conduct of commercial and financial dealings between the nations of the world. The inter-war period, dominated by the Great Depression, excessive protectionism and widespread discriminatory trade practices, saw a number of international conferences in 1922, 1927, 1932 and 1933 attempting to deal with the economic problems confronting the world. Neither the world economic conferences, nor the efforts of the League of Nations achieved real progress. In fact the net result was to increase rather than to decrease trade barriers during this period.

The declarations in the Atlantic Charter and the grand design of the United States and Britain for the post-war world order, in the early 1940s was meant to bring about for all States access on equal terms to the trade and raw materials of the world. These pronouncements in fact became the cornerstone for post-World War II international economic planning. The international economic plans devised as a result by the United States opted for multilateralism and the elimination of all preferential and discriminatory trade practices.

The United Nations Charter gave that organization authority to tackle international problems in the economic, social and humanitarian fields that faced the international community after the ravages of the Second World War. In discharging this responsibility, the United Nations

Economic and Social Council (ECOSOC) in 1946 established a Preparatory Committee of the International Conference on Trade and Employment. The outcome of this was the holding, in 1947 in Geneva, of the twenty-two nation multilaterial trade conference (which resulted in the General Agreement on Tariff and Trade--GATT) and in 1948 in Cuba, of the United Nations Conference on Trade and Employment (which produced the Havana Charter). When the General Agreement was negotiated, the problem of accelerating the economic development of the developing nations was not looked upon as a central issue. In fact many of the Afro-Asian states at that time were still under foreign domination.

By 1962 circumstances had changed and the developing countries in the "Cairo Declaration of the Developing Countries" complained and stressed that despite universal acknowledgment of the necessity to accelerate the pace of the development of the developing countries, adequate measures had not been adopted. To meet the needs of the developing countries, it was vehemently urged that it was not sufficient just to lay down some rules and principles indicating what had to be avoided in the conduct of international trade as was the case with the General Agreement. For the countries of the Third World it was essential to determine what had to be done and to formulate a policy of positive action. Further, the developing countries complained that the developed nations did not always comply with the rules and principles of the General Agreement unless it suited them. It was also pointed out forcefully by the developing countries that GATT had not served them the same way as it had the developed nations.

Over time the focus of the new States' discontent has also been directed towards the existing legal framework. Moreover, they believe this to reflect the traditional norms evolved by Western countries

For them the emphasis should be on the need for the law to be responsive to the aspirations of the developing nations. Recently, they have called for the democratization of the legal order to serve their particular economic goals. Also, the developing countries stress that international legal rules should reflect a consensus of the contemporary world community. It is even argued that it is

> *. . . not the function of international law in the second half of the twentieth century to protect the vested interests arising out of an international distribution of political and economic power which has irrevocably changed but to adjust conflicting interests on the basis which contemporary opinion regards sufficiently reasonable to be entitled to the organised support of a universal community.*

This disenchantment by the developing countries played an important part in the formation of UNCTAD in 1964. To some extent the same is also true for the call by them in 1966 for the progressive harmonization and unification of international trade law, which led to the establishment of UNCITRAL.

At present the concern for rapid economic development, particularly through furtherance of international trade in favour of the developing countries, has assumed new importance. The formalised international pursuit of the objectives of economic development has been described as being basically a post-World War II phenomenon. Just as the concept of economic development as an international responsibility has been by far the most important new departure in international affairs. An argument has been advanced by three authors[1] in the form that the aftermath of the World War II has been characterized by three major new developments which are essentially a new approach in the solution of international problems. One of these developments[2] it is pointed out, "is the massive expansion of international organization for cooperative purposes."[3] This phenomena is embodied as having "marked the transition of international law from the traditional system of formal rules of mutual respect and abstention to an incipient system of organized joint efforts for cooperation."[4] This has in turn led the authors to subscribe to the view that the term "international law of cooperation" is a general description of the manifold activities through which all or many or some of the world's States co-operate in pursuit of common values and interests.[5] The proponents emphasize that the distinction between "international law of cooperation" and "international law of coexistence" lies principally in its purpose--the main object of "international law of cooperation", they hold, is human welfare, covering diverse activities and encompassing, amongst others, regulation of international civil air transport, intensification of commercial relations, formulation of minimum standards of employment and social welfare, development of international communications, prevention of soil erosion, etc. A great majority of these activities they maintain are in the form of bilateral or multilateral agreements or treaties.[6]

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[1] Wolfgang Friedmann, Oliver Lissitzyn and Richard Pugh CASES AND MATERIALS ON INTERNATIONAL LAW (hereinafter cited as Friedmann CASES) at p. 9 (1960).

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[2] The other two major developments, referred to by the authors are--the growth in importance of non-Western States as members of the world community, and the widening gap between the "rich North" (the economically advanced States) and the "poor South" (the economically less developed States)--which "has led to an intensification of some major challenges to certain norms of international law developed by the economically advanced and capital-exporting states of the West" and has resulted in the establishment of some types of organizations to deal with this problem of the "rich" and "poor" nations--Friedmann CASES at pp. 9-10.

[3] Ibid., at p. 9.

[4] Wolfgang Friedmann "Some Impacts of Social Organization on International Law" 50 American Journal of International Law at p. 475 (1956).

[5] Friedmann CASES at p. 1008.

This shift in emphasis from traditional standards and conduct, more specifically in trade relations, has had a profound effect on the structure of international relations and generally on the development of international law. This has also raised in turn the problem of how to create an ordered system in the law and institutions of international economic relations which would best serve the new goals now being pursued.

The issues raised, from the legal perspective, as being barriers to the expansion of world trade, require us to review briefly the scope of contemporary international commercial law. The purpose of the brief survey that follows is to put the later discussion into perspective and to provide the necessary background to it. We should emphasize that no attempt will be made to carry out a truly comprehensive historical survey.

1. HISTORICAL ANTECEDENTS

For our purposes it would be adequate to regard the historical development of international commercial law as having gone through three phases.[7] It is now generally accepted that the first phase was in the form of the medieval lex mercatoria.[8] The second stage was its incorporation into the municipal laws of the various national States that succeeded the previous feudally stratified medieval social order.[9] The third phase, its modern manifestation, it is held, culminated in the general practice whereby commercial custom has developed widely accepted universal concepts.[10]

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[6] Idem.

[7] 1 UNCITRAL Y. B. at p. 21.

[8] John Honnold "The Influence of the Law of International Trade on the Development and Character of English and American Commercial Law" in Clive M. Schmitthoff (ed.) THE SOURCES OF THE LAW OF INTERNATIONAL TRADE (hereinafter cited as Schmitthoff SOURCES) at p. 88 (1964).

1.1 Ancient Heritage

One of the most ancient derivatives of world trade law could be traced even before 2000 B.C. to the old Babylonian Code of Hammurabi discovered at Susa.[11] The early Phoenician settlements in Greece undoubtedly left their mark as well.[12] Similarly, during ancient Egypt and Greece great trade routes existed and a large volume of trade was carried out in various commodities.[13] It is also believed that around 300 B.C. a maritime loan[14] was known to have existed in ancient Greece which was extensively used in sea-borne trade. It is also abundantly clear that under Rome the jus gentium[15] was also developed which, according to Sohm,[16] was applied to foreign traders. By the time of Imperial Rome there was no distinction between the rules of jus gentium and jus civile at least as far as commercial transactions were concerned.

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[9] Ernest von Caemmerer "The Influence of the Law of International Trade on the Development and Character of the Commercial Law in the Civil Law Countries" in Schmitthoff SOURCES at pp. 89-93. Also see John Honnold in Schmitthoff SOURCES at pp. 71-74.

[10] Clive M. Schmitthoff "The Law of International Trade, Its Growth, Formulation and Operation" in Schmitthoff SOURCES at pp. 3-5.

[11] The Code of Hammurabi, it is believed, which was carried by Babylonian traders to Phoenicia and to the Mediterranean world, was acknowledged to have been based on an older Babylonian law (or perhaps even a Sumerian law--Lipit-Istar's Law of 2207 B.C. which is held to be not unrelated to the laws of Hummurabi), descended from still an older Mesopotamiam culture--A. R. Driver and J. C. Miles THE BABYLONIAN LAWS at p. 306 (1960). Also, Richard W. Nice (ed.) TREASURY OF LAW (hereinafter cited as Nice TREASURY) at p. 36 (1964).

[12] W. A. Bewes THE ROMANCE OF THE LAW MERCHANT (hereinafter cited Bewes LAW MERCHANT) at p. 1 (1923).

[13] For ancient law of Egypt and Greece (as well as for ancient texts relating to them)--Nice TREASURY at pp. 45 and 63.

[14] W. Ashburner THE RHODIAN SEA-LAW at p. ccxii (1909).

With the decline of the Roman Empire in the West (and even before the so-called "Barbarian invasion") and its fall, the centre of trade had moved East to Byzantine. However, the Mediterranean still remained a route of communication and trade so that it could still be referred to as a European Mare Nostrum. But the entry of Islam severed this age-old link and the Mediterranean in fact became a barrier so that, as Henri Pirenne describes it, "the Christians, says Ibn Khaldun picturesquely, can no longer float a plank on it and the economic equilibrium" collapsed.[17] The empire of Charlemagne was essentially a continental one, and it is correctly observed that from this sprang a new economic order.[18] Despite this, in the ninth century, Byzantine and Italian cities traded with the Arabs of Sicily, Africa and Asia Minor; but with Western Europe the antagonism of the two faiths kept them in a state of constant war, which contributed to a degree to the decline of Western Europe's commercial activities.[19] On the other hand, the

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[15] Edward Poste THE INSTITUTES OF GAIUS Part 1-G.1.78 and 82; G.3.93 Fourth Edition (1952).
Also, J. B. Moyle THE INSTITUTES OF JUSTINIAN Volume I-D.1.1.1.4 and 1.1.4 (1912).

[16] Sohm's INSTITUTES OF ROMAN LAW (Translated by J. C. Ledlie) Third Edition at pp. 42-44; 46; 64-68 (1909).

[17] and [18] Henri Pirenne ECONOMIC AND SOCIAL HISTORY OF MEDIEVAL EUROPE at p. 3 (1936).

[19] Ibid., at p. 19.

> . . . Venetians entered into friendly relations with the Saracens of Alexandria and thus secured the profitable trade of the Nile and the Red Sea. . . . Venice, as the chief distributing mart of the Middle Ages, became in the fourteenth century the southern terminus of a great land trade route.[20]

Commercial treaties of this period concluded with Italian cities, according to Mamluk chancery practice, recognized the customs of the merchant.[21]

2. MEDIEVAL LEX MERCATORIA

> It has been too confidently assumed by most writers that the law merchant arose in Italy in the central part of the Middle Ages, was chiefly founded on Roman Law, and was carried by traders of that country, who at that time almost monopolised international trade, into every country which they penetrated.[22]

Bewes disputes this assumption that the law originated with the Italian merchants.[23]

2.1 Levantine Influence

The commercial renaissance of the Mediterranean was undoubtedly due to the Crusades, and "the law of the merchants, administered by their own consuls . . . was customary law, i.e., the habitual practice of merchants of all lands enforced in a summary manner by officials familiar with the trade."[24] It should also be remembered that during the early Crusades, the Canon law, not the Roman law, was prevailing (and which favoured simple good faith unhampered by formalities).[25]

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[20] Bewes LAW MERCHANT at p. 7.

[21] John A. Wansborough "A Mamluk Commercial Treaty Concluded with the Republic of Florence" in S. M. Stern and R. Walzer (eds.) ORIENTAL STUDIES Volume III - DOCUMENTS FROM ISLAMIC CHANCERIES at p. 74 (1965).

[22] Bewes LAW MERCHANT at p. 1.

[23] Idem.

As for the influence of Arab trade terms and usages on the *lex mercatoria*, Ghunaimi,[26] an Egyptian scholar, has made the following pertinent observation that

> *. . . the impact of Islam on the development of international law is amply felt in the domain of commerce, and, consequently, the relevant legal institutions. Damascus, Baghdad, Cordova and Cairo were the world centres of prodigious wealth and international significance, and in between lay Europe, darkened by medieval clouds, where the stage for Arab commercial activities was fact, the Arabs carried their trade to the remotest north of Europe. . . . In this sphere of relations, the Arab influence manifested itself in strengthening the rule "pacta sunt servanda", the occurrence of envoys negotiating commercial interests and, in particular, the rules regulating the status of aliens. The Islamic institution of "aman" or safe-conduct,*[27] *which was later substitued by state treaties tolerating more rights for foreigners played a primordial and impressive role in this respect.*[28] *The Islamic impact also shows its traces in the general principles incorporated into different European civil codes for example the Islamic dictum "al-'aqd sharia 'at al-muta'qidin" or the contract is the Sharia (or sacred law) of the contracting parties.*[29]

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[24] *Ibid.*, at p. 8.

[25] *Ibid.*, at p. 9.

[26] M. T. al Ghunaimi THE MUSLIM CONCEPTION OF INTERNATIONAL LAW AND THE WESTERN APPROACH (1968).

[27] Hitti, a prominent Arabist, states that this "*aman*" (safe-conduct) was often granted even to the Crusaders--Philip K. Hitti HISTORY OF THE ARABS at p. 643 (1951).

[28] C. H. Alexandrowicz THE LAW OF NATIONS IN THE EAST INDIES at pp. 71-72 (1967).

[29] Ghunaimi *op. cit.* at pp. 83-84.

During this period a series of events mark the rise and progress of the commercial greatness of the so-called maritime States on the European sea-coast, followed by the gradual movement inland and the development of commerce in interior towns and the establishment of regular markets and fairs.[30] Thus, in the courts of the sea-ports and those cities which had fairs and markets, the commercial customs and usages of many nations met the local trade customs. These courts, based originally on charters, franchise and privilege, along with the merchant guilds using the guild's court (usually presided over by a Consul) began to apply a law that seemed common to all traders.[31]

2.2 Ancient Maritime Codes

It is clear that the customs of the Italian cities (as previously indicated, influenced to some extent by the Canon law) along with the acceptance of the Consulado del Mare,[32] Roles d'Oleron,[33] and the Laws of Wisby[34]--the so-called maritime codes--played a most significant role in the development of a type of universal commercial law. The Consulado, which it is maintained,[35] was not compiled until the fourteenth century, contained amongst other provisions the leading principles of the contract of affreightment, as well as the rudiments of maritime documents like the charter-party and the bill of lading.[36] The Roles d'Oleron, it is believed,[37] was not composed at once but in four parts. The first or primitive part was compiled prior to 1266 (but not before 1155)[38] and is of provincial French in origin. When Eleanor, Duchess of Aquitaine married the Duke of Normandy (later Henry II of England) the isle of Oleron came under the English crown for a period, and it is more than likely that the earlier parts of the laws of Oleron enjoyed a special prestige in England.[39] The other parts were of later origin and the fourth part being as late as the sixteenth century.[40] The Roles d'Oleron also had the leading principles of the contract of affreightment and rules for liability for damage for improper stowage, loading or unloading[41] described in its text. As for the Laws of Wisby, these were believed to have been written not prior to the fourteenth century and were believed to have come after the two maritime codes, the Consulado del Mare and the Roles d'Oleron[42] (in fact some of the articles from the

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[30] James Reddie AN HISTORICAL VIEW OF THE LAW OF MARITIME COMMERCE (hereinafter cited as Reddie HISTORICAL) at pp. 138-139 (1841).

[31] Ernest von Caemmerer in Schmitthoff SOURCES at p. 89.

[32] Consulado del Mare--a Maritime Code (believed first printed around 1484 but known to have been used in 1279 and embodied by Royal Degree in 1347) of Barcelona--Bewes LAW MERCHANT at pp. 81-82. Also, Grant Gilmore and Charles Black THE LAW OF ADMIRALTY (hereinafter cited as Gilmore and Black ADMIRALTY) at p. 5 (1957).

[33] Roles d'Oleron or Charte d'Oleron--this Maritime Code is stated to have been promulgated by Eleanor of Aquitane--Gilmore and Black ADMIRALTY at pp. 6-7.

[34] Ibid., at p. 6.

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[35] Reddie HISTORICAL at p. 195.

[36] Ibid., at p. 202.

[37] Ibid., at p. 209.

[38] Ibid., at p. 216.

[39] Ibid., at pp. 213-214.

[40] Ibid., at p. 219.

[41] Ibid., at p. 220.

[42] Ibid., at pp. 232-233.

Roles d'Oleron are also found in the Laws of Wisby).

Schlesinger has given a fairly accurate account of the position when he states that the

> *. . . main characteristics of the substantive law which was created by the commercial courts, were emphasis on freedom of contract and on freedom of alienability of movable property, both tangible and intangible; abrogation of legal technicalities; and, most importantly, a tendency to decide cases ex aequo et bono rather than by abstract scholastic deductions from Roman texts. No wonder, then, that commercial law was a highly successful institution. Cosmopolitan in nature and inherently superior to the general law, the law merchant by the end of the medieval period had become the very foundation of an expanding commerce throughout the Western world.*[43]

3. INCORPORATION INTO MUNICIPAL LAWS

3.1 England

Since the growth of English Law Merchant is held to have gone through three stages of development (the third stage leading to its incorporation as part of the Common Law), it will be useful for us briefly to describe the stages of development.

The first stage ended with Coke's appointment as Lord Chief Justice in 1606. Before that time, the Law Merchant was a special law administered by special courts for a special class. As far back as to the time of Bracton in the thirteenth century, it had been recognized that there were certain classes of people "who ought to have swift justice, such as merchants, to whom justice is given in the Court Pepoudrous."[44] An examination of the Abbot's Roll of the Fair of St. Ives (edited for the Selden Society by Maitland) held in 1275 and 1291, contains a series of cases which clearly show how the merchants administered the Law Merchant and why such cases did not come before the King's Court.[45]

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[43] R. B. Schlesinger COMPARATIVE LAW Second Edition at p. 185 (1960).

[44] Bracton f. 334.

Although the courts of markets and fairs,[46] particularly the courts of piepowder (resembling similar ones on the Continent) were permitted to apply commercial law based on prevailing trade customs and usage, they were soon superseded by the Courts of the Staple,[47] established by the Statute of Staples, 1353.[48] Previous to that time Edward I had recognized by Carta Mercatoria, 1303[49] the Law Merchant as part of the law of the land.

Gerard Malynes, who is credited for having written the first book on the Law Merchant in England, stated in his Preface that "I have entitutled the book according to the ancient name Lex Mercatoria and not Jus Mercatorum because it is customary law approved by the authority of all kingdoms and commenwealthes and not a law established by the sovereignity of any prince."[50]

The second stage can be said to have been from 1606 to 1756.[51]

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45 Frederic William Maitland (ed.) Selden Society SELECT PLEAS IN MANORIAL AND OTHER SEIGNORIAL COURTS Volume 2 at p. 130 et seq. (1888).

46 Ibid., at p. 133.

47 T. F. T. Plucknett CONCISE HISTORY OF THE COMMON LAW Fourth Edition at p. 622 (1948).

48 27 Edward III, stat. 2 (1353)--STATUTES OF THE REALM Volume I at pp. 332-343 (Reprinted 1963).

49 Sir Frederick Pollock and Frederic William Maitland THE HISTORY OF ENGLISH LAW Second Edition at pp. 465-467 (1923).

50 Gerald Malynes CONSUETUDO VEL LEX MERCATORIA Preface (1622).

51 T. E. Sutton in SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY Volume III at p. 12 (1909).

Just when maritime and mercantile jurisdiction seemed most desirable for the merchant class, the common lawyers began to covet it. First, the local fair courts, followed by the local maritime courts (which waged a losing battle with the Courts of the Admirality) and then the Admiralty Courts came into conflict with the Courts of the Common Law. Coke as soon as he came to the Bench began a deliberate campaign to cripple the Court of Admiralty by the use of fictions in order to usurp jurisdiction from that court. During this period the special courts slowly died out and what was left of the Law Merchant was administered by the King's Courts of Common Law as a custom and not as law. At first the custom only applied if the parties were adjudged to be merchants.[52]

The sad situation above continued till the advent of Lord Mansfield on the scene in 1756. This heralded the third stage, which can properly be described as being the real period of the construction of a system of mercantile law for England. He began the process of embodying and giving form to the then existing customs of merchants by incorporating them as part of the Common Law. In Luke v. Lyde,[53] Lord Mansfield pointed out, "the maritime law is not the law of a particular country, but the general law of the nations," in a case where the question of freight, due on a contract of affreightment, that was interrupted by capture and recapture, was settled by reference to the Rhodian Sea-Law and a number of books on the Law Merchant of the European Continent. Whilst in Pillans v. van Meerop,[54] he said. "the law of merchants and the law of the land is the same: a witness cannot be admitted to prove the law of merchants. We must consider it as a point of law. A nudum pactum does not exist in the usage and law of merchants."[55] In Lickbarrow v. Mason,[56] Mr. Justice Buller made reference to the great contribution made by Lord Mansfield when he observed that before that

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[52] Ibid., at p. 13.

[53] (1759) 2 Burr. 822.

[54] (1765) 3 Burr. 1663.

> . . . period we find in Courts of Law all evidence in mercantile cases was thrown together; they were left generally to the jury and they produced no established principle. From that time we know the great study has been to find some certain general principle, not only to rule that particular case but to serve as a guide for the future. Most of us have heard this principle stated, reasoned upon; enlarged and explained . . . and I should be sorry to find myself under the necessity of differing from Lord Mansfield, who may truly be said to be the founder of the commercial law of England.[57]

Blackstone in his COMMENTARIES maintained that the

> . . . affairs of commerce are regulated by a law of their own called the Law Merchant or Lex Mercatoria, which all nations agree in and take notice of and it is particularly held to be the part of the law of England which decides the causes of merchants by the general rules which obtain in all commercial countries and that often even in matters relating to domestic trade, as for instance, in drawing, the acceptance and transfer of Bills of Exchange.[58]

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[55] Ibid., at p. 1669.
See, also Vanheath v. Turner (1622) Winch 24--where Lord Chief Justice Hobart said "the custom of merchants is part of the common law of this country, of which the judges ought to take notice, and if any doubt arise to them about their custom they may send to the merchants to know their custom."

[56] (1786) 2 T.R. 73.

[57] Idem

[58] Blackstone COMMENTARIES ON THE LAWS OF ENGLAND Volume I at p. 273 (1825).

3.2 Scotland

In Scotland from the time of James I (and as early as 1466) there were numerous statutes regulating foreign trade and shipping. Many of these reflect the influence of the old maritime codes of various nations and there were also frequent references in the statutes of Scotland to the Staple port at Middleburg and Compvere. The Rhodian Sea-Law, adopted by the Roman Law and in so far as thus preserved, was inherited by Scotland on the reception of Roman Civil Law. The Consulado del Mare, the Laws of Oleron and of Wisby were familiar to Scottish lawyers.[59] In Coltran v. Mathie,[60] the question to be decided was whether the liability of a shipowner was in solidum, limited to the value of the ship and freight. This was ultimately determined in accordance with the civil law rules in favour of in solidum liability but only after reference was made to the customs pertaining to the Port of Antwerp and of Lubeck, to the writings of Grotius, the customs of Holland and France and even an enquiry into the customs of England and other countries (besides Holland and France) on this specific point. In Scrimegeow v. Alexander and Richardson,[61] the laws of Oleron and of Wisby were invoked as expressing the maritime usages of nations. Also, there were established from the earliest times in Scotland, like other countries, fairs and markets to which foreign traders came. In the

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[59] Lord Murray "The Law Merchant" in Lord Macmillan (Introduction) Stair Society THE SOURCES AND LITERATURE OF SCOTS LAW Volume I at p. 243 (1936).

[60] (1707) Mor. Dict. 3951.

[61] (1769) Mor. Dict. 3955.

Act of 1456[62] there is a reference to the Court of the Fair. The jurisdiction of the Court of the Fair was centered in the King's officers, or the local authority--burghal or feudal. There is ample evidence that Scottish law recognized and gave effect to mercantile usages. It is observed by Lord Murray that the whole law in Scotland as to bills of exchange and their special rights and privileges rests on the law of merchant.[63]

Bell's COMMENTARIES, the well-known Scottish authority, held that the

> *. . . Law Merchant is universal. It is part of the law of nations, grounded on principles of natural equity, as regulating the transactions of men who reside in different countries, and carry on the intercourse of nations, independently of local customs and municipal laws of particular States. For the illustration of this law, the decisions of courts, and the writings of lawyers in different countries, are as the recorded evidence of the application of the general principle, not making the law, but handing it down; not to be quoted as precedents, or as authorities to be implicitly followed, but to be taken as guides towards the establishment of the pure principles of general jurisprudence.*[64]

3.3 France

In France, the maritime law had been codified in the Guidon de la Mer (1607),[65] and the Ordinances of Louis XIV[66] completed the work. The Reglement pour le Commerce de Marchands (1673)[67] codified the general commercial law. The Ordonnance de la Marine (1681)[68] codified the maritime law for France as well as for her Colonies. Finally, the Napoleonic Code of 1807[69] crowned France's entire process of codification. This Code's pervasive influence conquered, not only the Continent, but also Egypt and many South and Central American republics.[70] It must be observed that the customs and usages of traders were part of the law of France (just as for other Continental countries), which were codified in the above laws.

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[62] Lord Murray op. cit. at p. 245.

[63] Ibid., at p. 248.

[64] Bell's COMMENTARIES ON THE LAW OF SCOTLAND Seventh Edition Volume I at p. XI (1870).

[65] Gilmore and Black ADMIRALTY at p. 49.

[66] and [67] Ernest von Caemmerer in Schmitthoff SOURCES at p. 90.

3.4 Other European Countries

In Portugal, the Ordenacoes Alfonsinas[71] was promulgated as early as 1446 but did not contain sufficient commercial law to cover all situations, so the courts borrowed from the customary law which was common to all traders in the Mediterranean region to fill the gaps. The subsequent 1833 Portuguese code was based on the Spanish,[72] Dutch and Prussian codes. The Portuguese code has been held to have influenced the codes of Brazil, Argentina and Paraguay.[73]

As for Russia, dating back to 1649 during Czar Michailovitch's time, the Svod [74] was the commercial code in use. This Code, digested and compiled once again in 1835, continued to serve Russia till the Russian Revolution. It must be mentioned that the whole of the Russian Empire was not governed by this Code. The Baltic provinces were governed by the Baltic Civil Code of 1864.[75] Bessarabia continued to use the fourteenth century laws of Hermenapoulos,[76] as well as the customs of merchants; Finland (when still part of the Russian Empire) used Swedish law; and parts of Poland used French law.[77]

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[68] Gilmore and Black ADMIRALTY at p. 8.

[69] Fredrick Wallach INTRODUCTION TO EUROPEAN COMMERCIAL LAW (hereinafter cited as Wallach INTRODUCTION) at pp. 25-26 (1953).

[70] Robert Charles Kelso INTERNATIONAL LAW OF COMMERCE Second Edition (hereinafter cited as Kelso LAW COMMERCE) at pp. 13-14 (1961).

[71] Ibid., at p. 15.

[72] Wallach INTRODUCTION at pp. 25-26.

[73] Idem.

[74] Idem.

In Germany by 1586[78] there was a general commercial code which applied only to the Hanseatic League. Prussia in 1794[79] drew up a general code and in 1867 the North German Confederation adopted the 1861 Code formulated by the Customs Union established in that part of Germany.[80] The German Code of 1897--Handelsgesetzbuch--HGB--(Commercial Code)[81] replaced the 1867 Code. The laws of Italy in the nineteenth century were influenced by the German Code.[82]

3.5 United States of America

In the United States of America, after the American War of Independence there was a period of cosmopolitan receptiveness of international commercial custom. In Swift v. Tyson, Mr. Justice Story stated that "the law respecting negotiable instruments may be truly declared in the language of Cicero adopted by Lord Mansfield in Luke v. Lyde . . . to be in a great measure not the law of a single country only, but of the commercial world."[83] But this early enthusiasm gave way soon to the desire for the new republic to expend its frontiers and with the emergence of many States and many jurisdictions the greater need for uniformity of laws within the United States took priority over the legal development on an universal scale.

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[75] *Idem.*

[76] *Idem.*

[77] *Idem.*

[78] *Idem.*

[79] Kelso LAW COMMERCE at p. 22.

[80] Ernst von Caemmerer in Schmitthoff SOURCES at p. 90.

[81] *Idem.*

[82] Wallach INTRODUCTION at p. 26.

3.6 Afro-Asian Countries

As for the Asian and African countries, they were for the most part the unfortunate inheritors of colonial legislation and laws. This in fact meant the use of the prevailing laws of the metropolitan centres.[84] The system of Capitulations introduced in the Ottoman Empire during the nineteenth century elements of European laws (more particularly in the commercial field). The Tanzimat reforms of 1839-1876 witnessed a further reception of European laws in the Ottoman Empire. The Turkish Commercial Code of 1850 and the Code of Maritime Commerce of 1863 were essentially based upon French Codes.[85] Egyptian Commercial and Maritime Codes from 1875 onwards were also basically derived from French law.[86] On the other hand Morocco, Tunisia and Northern Nigeria retained their traditional system of Islamic law.[87] In the Indian sub-continent and Sudan the use of the provision (usually found in British colonial legislations) of "justice, equity and good conscience" by the colonial courts inevitably led them to apply English laws as developed by the English courts.[88]

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[83] 41 U.S. (16 Pet.) 1 at p. 19 (1842).

[84] Ernest Boka "The Sources of the Law of International Trade in the Developing Countries of Africa" in Schmitthoff SOURCES at p. 227.

[85] N. J. Coulson "A History of Islamic Law" in W. Montgomery Watt (ed.) ISLAMIC SURVEY at pp. 150-151 (1964).

[86] Ibid., at p. 152.

4. NINETEENTH CENTURY

4.1 General

As previously indicated prior to the nineteenth century the law merchant

> *. . . was not considered as being in essence a national phenomenon. It was rather the manifestation of a particular way of looking at things, and a particular conception of the social order, common to a particular type of civilization. The methods of legal science, the formulation of rules, the rules themselves, were all avowedly international. The national systems were only intended to implement these rules, and to supplement and modify them in peculiar contingencies, needs, or traditions.*[89]

The codification that followed in Europe (initially in France) was essentially inspired by the idea of clarifying and bringing the law up to date. In this process a new idea "developed in the nineteenth century; the idea that it is the province of the legislator not only to declare the existing law, but also to modify it on occasion."[90] The decline of universal commercial law that ensued as a result was attributed in part to the tendency of countries to national regulation, whether in the form of the use of statutory codes utilized in Europe, or by judicial activity adopted by the Common Law. This, it is believed, whether intended or not, introduced a certain degree of rigidity and national bias in the law as against the previous cosmopolitanism. Andre Tunc[91] has described this "nationalism in the field of law as the unfortunate result of French codification and of the German historical[92] jurisprudence."

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[87] Ibid., at p. 156.

[88] Ibid., at pp. 155-156.

[89] Rene David THE INTERNATIONAL UNIFICATION OF LAW (Chapter 5 in Volume II, The Legal Systems of The World, Their Comparison and Unification of the INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW) at p. 18.

[90] Idem.

Legislative enactments and judicial practices in pursuit of narrowly conceived national interests also gave rise to a sharp divergence in the laws. This development also affected the universal movement of goods and merchandise at a time when advanced technology and the nineteenth century industrial revolution was in the process of bringing about a wide expansion in international commerce. It has been held that large scale international trade has always needed, in addition to other necessary conditions, a certain measure of security and predictability[93] with respect to the enforcement of obligations. To some extent this certainty was secured by the use of the rules of the conflict of laws. Similarly, the juridical technique of arbitration[94] as an aid to solution-seeking specifically in commercial matters has not achieved universal acceptance either, so that a body of acceptable rules might be evolved by these tribunals over a period of time. This state of affairs, it was suggested, even brought about the so-called extra-legal development (in the form of frequent use of stereotype trade clauses peculiar to international transactions or of standard form contracts, etc.) by the international commercial community which sought remedies to overcome the undoubted inconvenience caused to international trade.

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[91] Andre Tunc "English and Continental Commercial Law" 1961 Journal of Business Law at p. 237.

[92] The Historical School justified their development "by declaring that the law must be different for each people"--Rene David op. cit at p. 18.

[93] Ernst Rabel CONFLICT OF LAWS: A COMPARATIVE STUDY Volume II Second Edition (ed.) U. Drobnig at pp. 367-370 (1960).

[94] Martin Domke THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION (1968). Also, see U.N. Docs. A/CN.9/64--INTERNATIONAL COMMERCIAL ARBITRATION Report of Special Rapporteur (Mr. Ion Nester).

However, by the end of the nineteenth century it became increasingly apparent (particularly due to the diversity in the application of national laws to commercial matters) that a greater measure of certainty and predictability had to be achieved by creating uniformity, not only in the conflict rules, but also in the substantive law by the use of international conventions.[95]

4.2 Uniform Laws

Despite this, however, efforts were made with varying degrees of success to counter-balance this narrow nationalistic trend. In the nineteenth and early twentieth centuries activities were directed towards the creation of uniform laws in commercial matters, especially relating to postal services; sea, air and rail transportation; and bills of exchange by the use of international conventions and other suitable means. The causes of this trend have been expounded by Andre Tunc as being: the similarity of commercial experience in the various countries the political and economic importance of some countries--resulting in the so-called "radiation of their laws"; and the acceptance of international conventions.[96] It has even been postulated that three characteristics manifest themselves in this contemporary stage of development. These are: "First, the rules of international trade exhibit a remarkable similarity in all municipal jurisdictions."[97] The reason for this universal similarity, it is argued, is based on three fundamental propositions, that the parties are free (subject to any national legal limitations) to contract--the so-called principle of the autonomy of the parties' will; that the contract struck must be fulfilled--*pacta sunt servanda*; that arbitration is widely used for settlement of trade disputes.[98] Second, the application of international trade law in a municipal context is "only by leave and licence of the national sovereign."[99] Third, the formulation of the rules of international trade is carried out by international agencies, both governmental and non-governmental.[100]

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[95] Chaveau "Conventions for Uniform Laws", 83 Journal Du Droit International at p. 575 (1956).

Aleksander Goldstajn as early as 1961 expressed the view that "it is time that recognition be given to the existence of an autonomous commercial law that has grown independent of the national systems of law."[101] Recently a new dimension has been added to this, which has been aptly described as the world-wide concern for the "progressive" development of international trade law.[102]

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[96] Andre Tunc *op. cit.* at p. 237.

[97] 1 UNCITRAL Y. B. at p. 22.

[98] *Idem*.

[99] Schmitthoff SOURCES at p. 4.

[100] 1 UNCITRAL Y. B. at p. 22.

[101] A. Goldstajn "The New Law Merchant Reconsidered" in Fritz Fabricus (ed.) LAW AND INTERNATIONAL TRADE Festschrift fur Clive M. Schmitthoff (hereinafter cited as Fabricus INTERNATIONAL TRADE) at p. 171 (1973).

5. PROGRESSIVE DEVELOPMENT

5.1 General

Until about the end of the nineteenth century the International Law Association,[103] a non-governmental international organization of European countries; was almost exclusively concerned with this movement for unification on a supra-national basis. The convening in 1893 by the Netherlands Government of the first Hague Conference[104] for Regulation of Various Questions of Private International Law (restricted to European states) was "really intended to bring to an end the state of "international anarchy in private law denounced by Mancini."[105] In the twentieth century, the formation of the Comite Maritime International--CMI

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[102] Succintly described by the Netherlands representative in 1965 in the Sixth Committee of the General Assembly when he pertinently observed "the United Nations was already in the middle of the Development Decade, while the United Nations Conference on Trade and Development has initiated an ambitious programme of co-operation for economic development and for the expansion of trade. It was therefore important that the development of the law should not lag behind technical and material achievements--the so-called "legal lag"."--U.N. Doc. G.A.O.R., Twentieth Session (1965) Sixth Committee 896th meeting.

[103] TRANSACTIONS OF THE INTERNATIONAL LAW ASSOCIATION 1873-1924 compiled by Wyndham A. Bewes at pp. 1-8 (1926). Also, see Soia Mentschikoff and Nicholas de B. Katzenbach (Project Reporters) Report of The American Bar Association Special Committee on INTERNATIONAL UNIFICATION OF PRIVATE LAW at pp. 33-36 (1961).

[104] M. H. van Hoogstraten "The United Kingdom joins an Uncommon Market : The Hague Conference on Private International Law" 12 International and Comparative Law Quarterly 148 (1963). Also, see Nadelmann "The United States joins the Hague Conference on Private International Law" 30 Law and Contemporary Problems 291 (1965).

[105] Rene David op. cit. at p. 143.

(International Maritime Committee)[106] of European participants, marked the start of technical co-operation between those primarily concerned in over-seas trade and led eventually to the creation of some important international conventions in the field of maritime law.

5.2 League of Nations Experience

The next major development was the creation of the League of Nations.[107] President Woodrow Wilson in the third, of his fourteen points, proposed the "removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all nations consenting to the peace and associating themselves for its maintenance."[108] In the third draft of the Covenant submitted by President Wilson to the Paris Peace Conference,[109] he provided:

> *It is further covenanted and agreed by the Contracting Powers that in their fiscal and economic regulations and policy no discrimination shall be made between one nation and another among those with which they have commercial and financial dealings.*[110]

The Covenant of the League of Nations in Article 23 (e) required that member States would "secure and maintain freedom of communication and transit and equitable treatment for the commerce of all Members of the League."[111]

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[106] CMI was founded in 1897 in Antwerp with the active co-operation of the International Law Association--Franck "A New Law of the Seas" 42 Law Quarterly Review 25 (1926). See, also Scott and Miller "Unification of Maritime and Commercial Law Through the Comite Maritime International" 1 Int'l L. Q. 482 (1947). C.M.I. is made up of maritime law associations in 228 countries - Joseph C. Sweeney op. cit. at p. 75.

[107] F. P. Walters A HISTORY OF THE LEAGUE OF NATIONS (1967).

[108] David H. Miller THE DRAFTING OF THE COVENANT Volume 1 at p.19 (1928).

[109] David H. Miller op. cit. Volume 2 at p. 98.

[110] Ibid., at p. 105 (SUPPLEMENTARY AGREEMENTS : X).

The League took this provision in the Covenant to mean that one of its main aims was to be the reorganization of the world economy that had been badly disrupted by the first World War. The Economic Committee of the League of Nations[112] was assigned that task. International economic conferences in 1922;[113] 1927;[114] 1932;[115] and 1933[116] attempted to deal with world economic problems and a topic of important legal study at that time was the most-favoured-nation clause.[117] The League also in 1924 established the Committee of Experts for the Progressive Codification of International Law.[118] The Committee of Experts prepared a list of subjects, which it considered "sufficiently ripe" for codification.[119]

Neither the world economic conferences nor the League itself achieved real progress towards the programme envisioned by the League. In fact the net result in the inter-war period was to increase rather than to decrease trade barriers.[120]

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[111] Ibid., at p. 739.

[112] F. P. Walters op. cit. at pp. 177-178.

[113] Ibid., at pp. 165-166.

[114] Ibid., at pp. 425-426.

[115] Ibid., at pp. 517-520.

[116] Ibid., at pp. 520-523.

[117] Shabtai Rosenne (ed.) LEAGUE OF NATIONS' COMMITTEE FOR THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW Volume 1 at pp. 327-328 (1972).

[118] Ibid., at p. vii.

[119] Idem.

We should also make some mention about the international payments system utilized during this period. The use of gold as the basis of international exchange and the free convertibility of bank notes into gold enabled central banks, through informal co-operation, to carry out international payments.[121] However, the breakdown of the gold standard in the inter-war period changed the situation dramatically, which in fact led to the frequent use of governmental regulations and which undoubtedly affected international payments and trade.[122]

Some of the other important international entities involved during early twentieth century in the area of international economic and commercial affairs included the International Chamber of Commerce;[123] The Institute of International Law;[124] and the International Institute for the Unification of Private Law (UNIDROIT).[125]

Moreover, the inter-war period was dominated by the Great Depression, excessive protectionism and widespread discriminatory trade practices, including the extensive application of quantitive restrictions. Though the outbreak of the Second World War spelled the end of the limited proposals that had in the meantime been directed towards the solution of the central problems facing the world, those of economy, unemployment and protectionism; nevertheless, during the war itself some groundwork was laid. The initiative was taken by the United States of America for the restoration of trade on the basis of multilateralism and the elimination of all preferential and discriminatory practices.[126] Clair Wilcox observed that the "United States has always believed that every nation should afford equal treatment to the commerce of all friendly States . . . the United States has been opposed and is opposed to the preferential tariff systems and the discriminatory administration of import quotas and exchange controls."[127]

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[120] F. P. Walters op. cit. at pp. 520-523.

[121] C. H. Alexandrowicz WORLD ECONOMIC AGENCIES LAW AND PRACTICE (hereinafter cited as Alexandrowicz ECONOMIC AGENCIES) at p. 167 (1962).

[122] Ibid., at p. 168.

[123] Rene David op. cit. at pp. 58-59.

[124] Mentschikoff and Katzenbach op. cit. at pp. 29-33.

[125] Rene David op. cit. at pp. 133-139.

In Principles Four and Five of the Atlantic Charter it was the declared intention of the United States and Britain to endeavour "to further the enjoyment by all States, great or small, victors or vanquished, of access, on equal terms, to the trade and raw materials of the world which are needed for their economic prosperity."[128] In Article 7 of the Mutual Aid Agreement signed in February 1942 by the United States and Britain, the parties pledged themselves

> *. . . to the elimination of all forms of discriminatory treatment in international commerce, and to the reduction of tariffs and other trade barriers; and, in general to the attainment of all economic objectives set forth in the Joint Declaration made on August 14, 1941 by the President of the United States of America and the Prime Minister of the United Kingdom.*[129]

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[126] Richard Gardner STERLING-DOLLAR DIPLOMACY (hereinafter cited as Gardner STERLING-DOLLAR) at p. 13 (1956).

[127] Clair Wilcox A CHARTER FOR WORLD TRADE (hereinafter cited as Wilcox TRADE CHARTER) at p. 9 (1949).

[128] 204 League of Nations Treaty Series 381 at p. 384.

[129] Ibid., at p. 392.

These pronouncements in fact became the cornerstone for post-Second World War international economic planning as envisioned by the United States.

The Bretton Woods Conference in 1944 also recommended the reduction "of obstacles to international trade and in other ways to promote mutually advantageous international commercial relations."[130] The establishment of a sound international payments system was also held to be an essential prerequisite to the further development of international trade. The creation of the International Monetary Fund[131] by the Bretton Woods agreement, it was felt, provided the necessary international monetary co-operation by promoting exchange stability and other fiscal policies.[132]

5.3 Role of the United Nations

The United Nations Charter was far more extensive in scope than the Covenant of the League of Nations in dealing with the problems that faced the world after the ravages of the Second World War. Article 1[133] of the Charter gave the organization the authority to tackle international problems in economic, social and humanitarian fields, while Article 13[134] authorized the General Assembly to initiate studies and make recommendations with a view to promoting international co-operation in the economic field, as well as encouraging the progressive development of international law and its codification (pursuant to the latter authority, the International Law Commission was established in 1941[135] and UNCITRAL in 1966).[136] Article 55[137] stated that:

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[130] United Nations Monetary and Financial Conference, FINAL ACT AND RELATED DOCUMENTS at p. 24 (1944).

[131] 2 United Nations Treaty Series 39.

[132] Alexandrowicz ECONOMIC AGENCIES at pp. 173-174.

[133] 1946-47 Y.B.U.N., U.N.P. Sale No.: 1941.I.18 at p. 831.

[134] Ibid., at p. 832.

> *With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principles of equal rights and self-determination of people, the United Nations shall promote . . . higher standards of living, full employment and conditions of economic and social progress and development [and] solutions of international economic . . . and related problems.*

In Article 56[138] all members pledged themselves to take joint and separate action for the achievement of the above purposes. Article 57[139] provided for the establishment of the specialized agencies. Article 62[140] empowered the Economic and Social Council (ECOSOC) to make or initiate studies and reports with respect to international economic and social matters. On the other hand Article 63[141] also envisaged ECOSOC as an organ for the purpose of co-ordinating the activities of the Specialized Agencies.

At its first session in February 1946 in London, ECOSOC on the motion of the United States adopted a resolution establishing a

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[135] G. A. Res. 174 (II) 21 November, 1947--1947-48 Y.B.U.N. at p. 210.

[136] G. A. Res. 2205 (XXI) 17 December, 1966--1 UNCITRAL Y. B. at pp. 65-66

[137] 1946-47 Y.B.U.N. at p. 837.

[138] Idem.

[139] Idem.

[140] Ibid., at p. 838.

[141] Idem.

Preparatory Committee of the International Conference on Trade and Employment.[142] The Preparatory Committee held its first session[143] in London during October-November 1946, at which time the United States submitted to it a draft of a "Suggested Charter for an International Trade Organization".[144] At that session the Preparatory Committee appointed a Drafting Committee.[145] Before the end of that session the United States announced its intention to initiate tariff negotiations with the countries participating in the activities of the Preparatory Committee.[146]

The Preparatory Committee held its second session[147] in April-October 1947 in Geneva, when it performed a dual function. The Preparatory Committee continued its efforts at working out a Draft Charter for the International Trade Organization of the United Nations. At the same time, some twenty-two nations undertook negotiations on tariffs[148] as a conference. Besides carrying out certain tariff reductions, this twenty-two nation conference agreed upon a multilateral trade agreement, incorporating in advance the commercial policy clauses of the Draft Charter, which resulted in the General Agreement on

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[142] ECOSOC Resolution 1/13, 18 February, 1946--U.N. Doc. E/22 (1946).

[143] United Nations Conference on Trade and Employment REPORT OF THE FIRST SESSION OF THE PREPARATORY COMMITTEE -London, October, 1946 -- U.N. Doc. E/PC/T/33 (hereinafter cited as PREPARATORY COMMITTEE LONDON FIRST SESSION or U.N. Doc. E/PC/T/33).

[144] Department of State Publication 2598 (1946).

[145] U.N. Doc. E/PC/T/34/Rev. 1 (5 March 1947).

[146] U.N. Doc. E/PC/T/33.

[147] U.N. Doc. E/PC/T/186.

[148] U.N. Doc. E/PC/T/TAC/PV1-5.

Tariff and Trade (GATT).[149] The GATT was intended to be a temporary arrangement pending the establishment of the International Trade Organization.

As a result of the work accomplished by the Preparatory Committee, a United Nations Conference on Trade and Employment was held in Cuba from November 1947 until April 1948,[150] when the Havana Charter was finally produced.[151] The Havana Charter was to establish a permanent International Trade Organization, but this never emerged.

The period following 1947 saw the greatest and most significant achievement in history, that of the independence from colonial rule and alien domination of a large number of peoples and nations. When the General Agreement had been negotiated the problem of accelerating economic development was not the central issue. In fact many of the Afro-Asian states were still under foreign domination. Yet as early as 1958 a report for GATT prepared by a Panel of Experts and entitled "Trends in International Trade",[152] galvanized some action through the appointment of a special committee (Committee III of GATT) to look at the particular obstacles to the exports of the developing countries.[153] Despite this the developing nations expressed in November 1962 "disappointment with the understanding and positions" displayed by the developed nations to the specific programme of action recommended to the GATT Ministerial meeting.[154]

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[149] 55 UNTS 308.

[150] U.N. Doc. E/Conf.2/78 (April 1948).

[151] Wilcox TRADE CHARTER at pp. 231-327.

[152] TRENDS IN INTERNATIONAL TRADE: REPORT BY A PANEL OF EXPERTS--GATT (1958).

[153] TRADE OF LESS DEVELOPED COUNTRIES: SPECIAL REPORT OF COMMITTEE III--GATT (1962).

In December 1961 the United Nations General Assembly had adopted a resolution entitled "International Trade as the primary instrument for economic development"[155] which requested the Secretary-General to consult governments about holding an international conference on world trade problems. In July 1962 a developing nations conference on the Problems of Economic Development held in Egypt adopted the "Cairo Declaration of the Developing Countries" which favoured the calling of an international economic conference within the framework of the United Nations, and urged that the agenda should include "all vital questions relating to international trade, primary commodity trade and economic relations between the developing and the developed countries."[156] The Cairo Declaration complained and stressed that "despite universal acknowledgment of the necessity to accelerate the pace of the development in less developed countries, adequate means of a concrete and positive nature [had] not been adopted."[157]

To meet the needs of the developing countries it was abundantly clear that it was not sufficient just to lay down some rules and principles indicating what had to be avoided in international trade (as was the feeling about the General Agreement); instead it was essential to determine what must be done and to formulate a policy of positive action.[158] The dissatisfaction of the developing countries was predicated on the belief that GATT had not served them the same way as it had the developed nations. The prime factor has been the "persistent tendency towards external imbalance associated with the development process."[159] It was pointed out on behalf of the developing countries that, while the primary commodity exports were expanding relatively slowly, demand for imports from developed nations of manufactured goods tended to grow rapidly.[160] Increased substitution of synthetics by the developed countries for natural products, mostly from the developing countries, was another critical factor. It was also alleged by the developing countries that the developed nations did not always comply with the rules and principles of GATT unless it suited them.[161]

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[154] GATT--BASIC INSTRUMENTS AND SELECTED DOCUMENTS 10th Supplement at pp. 28-32 (1962).

[155] G. A. Res. 1707 (XVI) 19 December, 1961--1961 Y.B.U.N. at pp. 191-193.

[156] U.N. Doc. A/5162, Annex (1962).

[157] _Idem_.

The foregoing disenchantment played some part in the creation of UNCTAD in 1964 with one of its objectives being that:

> *International trade should be conducted to mutual advantage on the basis of the most-favoured-nation treatment and should be free from measures detrimental to the trading interests of other countries. However, developed countries should grant concessions to developing countries and extend to developing countries all concessions they grant one another and should not in granting these and other concessions, require any concessions in return from developing countries. New preferential concessions, both tariff and*

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[158] Raul Prebisch TOWARDS A NEW TRADE POLICY FOR DEVELOPMENT Report of the Secretary-General of UNCTAD U.N.P. Sales No.: 64.II.B.4. (1964).

[159] Idem.

[160] Raul Prebisch TOWARDS A GLOBAL STRATEGY OF DEVELOPMENT U.N. Doc. TD/3/Rev. 1 at pp. 14-29.

[161] Raul Prebisch TOWARDS A NEW TRADE POLICY FOR DEVELOPMENT at p. 29.

> non-tariff, should be made to developing countries as a whole and such preferences should not be extended to developed countries. Developing countries need not extend to the developed countries preferential treatment in operation amongst them. Special preferences at present enjoyed by certain developing countries in certain developed countries should be regarded as transitional and subject to progressive reduction. They should be eliminated as and when effective international measures guaranteeing at least equivalent advantages to the countries concerned come into operation.[162]

In the preparation for UNCTAD I held in 1964 in Geneva, the Conference Secretariat had prepared a report--"The Developing Countries in GATT"[163]--which came to the conclusion that there was no dispute about a rule of law in world trade, it instead asked:

> The question is: What should be the character of that law? Should it be a law based on the presumption that the world is essentially homogeneous, being composed of countries of equal strength and comparable levels of economic development, a law founded, therefore, on the principles of reciprocity and non-discrimination? Or should it be a law that recognizes diversity of levels of economic development and differences in economic and social systems?[164]

Following upon UNCTAD I the General Assembly passed a resolution[165] which institutionalized it as a subsidiary organ to itself by providing for the establishment of the Trade and Development Board, the Committees of that Board (and their subsidiary and advisory bodies); the creation of a permanent full time secretariat (within the United Nations Secretariat);

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[162] UNCTAD I--PROCEEDINGS Volume I FINAL ACT AND REPORT U.N.P. Sales No.: 64.II.B.11.

[163] UNCTAD I--PROCEEDINGS Volume V U.N.P. Sales No.: 64.II.B.15 at p. 432.

[164] Idem.

[165] G. A. Res. 1995 (XIX) 30 December, 1964--U.N. Doc. A/5815 at pp. 1-5 (1965).

as well as for its membership (to be either Members of the United Nations or of the Specialized Agencies or of the International Atomic Energy Agency).[166] As directed by the above resolution the Trade and Development Board set up four committees: Committee on Commodities; Committee on Invisibles and Financing related to Trade; Committee on Manufactures; and Committee on Shipping.[167] The Trade and Development Board also established two seven-member Advisory Committees: one to the Trade and Development Board itself, and the other to the Committee on Commodities.[168]

Having concentrated initially on the main issues, these being mainly of an economic and commercial nature, UNCTAD then devoted its attention to the legal obstacles in the expansion of world trade by examining the prevailing practices in the field of shipping[169] and restrictive trade practices.[170] At about the same time the Hungarian Delegation proposed in a Note to the Secretary-General the inclusion, to the provisional agenda of the nineteenth session of the General Assembly in 1964, of an item entitled "Consideration of steps to be taken for the progressive development in the field of private international law with a particular view to promoting international trade."[171] Due to the abortiveness of that session over the question of the financial contributions towards the United Nations peace-keeping operations, the item was re-submitted by the Hungarian Delegation for the twentieth session in 1965.[172] In a background paper accompanying the Note the Hungarian Delegation attempted to justify United Nations involvement by pertinently observing that

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[166] In fact UNCTAD has more members than the United Nations itself; including San Marino, Switzerland, Republic of Korea, Republic of Vietnam, The Holy Sea, Liechtenstein and Monaco.--U.N. Doc. A/5815.

[167] Official Records of the Trade and Development Board, First Session, U.N. Doc. TD/B/SR. 1-24 (1965).

[168] U.N. Doc. TD/B/70.

[169] Ibid., at p. 4.

[170] U.N. Doc. TD/B/SR.20 at p. 104.

[171] 1 UNCITRAL Y.B. at p. 5.

> . . . *in contrast to the interstitial progressive development which is a necessary part of codification, there exists a kind of progressive development which is an independent primary activity, which is not connected with codification, and which. in the words of Article 15 of the Statute of the International Law Commission, consists of the international regulation of fields "which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States". Article 16 and 17 of the [above] Statute, which relates to this kind of progressive development, reserve the right of initiative in this regard to the General Assembly . . . since a political decision and a metajuridical consideration of the degree of the economic necessity of such work are required.*[173]

Having come to the conclusion that its initiative fell within a field that was not presently adequately regulated by international law and was not sufficiently developed in the practice of States, the Hungarian Delegation suggested that in light of the high interest displayed by the international community, more particularly the developing countries, the United Nations should find ways and means of systematically dealing with the law of international trade for possible simplification, harmonization and unification. It should also be mentioned that the Hungarian background paper reviewed the work done on codification and development of international law by the League and the United Nations, which showed that so far the role of the agencies had been marginal.[174]

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[172] Ibid., at p. 10.

[173] Ibid., at p. 6.

[174] UNIFICATION OF LAW YEARBOOK 1956 at p. 345.

5.4 Creation of UNCITRAL

The General Assembly convinced of the importance of the subject-matter passed a resolution in December 1965 requesting the Secretary-General to make a comprehensive report for its twenty-first session in 1966.[175] To carry out this survey, the services of Clive Schmitthoff, an eminent jurist in the field, were retained. The Secretary-General's Report[176] made an analysis of the concept[177] of international trade law by describing the legal techniques utilized to reduce conflicts and divergencies. It indicated the activities in the field carried out by inter-governmental (including regional efforts) and non-governmental organization, agencies and groupings. The Report also examined the methods, techniques, approaches and certain topics considered appropriate for progressive harmonization and unification. It recommended the establishment of a United Nations Commission on International Trade Law, so as to remedy the shortcomings found and described in the Report. The functions of the Commission were suggested as being those of co-ordination--primary task--and the formulation of rules in the field.

During the twenty-first session, the Sixth (Legal) Committee of the General Assembly debated the Secretary-General's Report. During the discussion certain fundamental attitudes, passionately held by a large number of the countries of the Third World, revealed themselves. First, the conviction that divergencies arising from the laws of different States

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[175] 1 UNCITRAL Y.B. at p. 18.

[176] Idem.

[177] Ibid., at pp. 20-21.

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in international trade constitute one of the obstacles to its development. Second, the perceptive observation that progress by intergovernmental and non-governmental organizations in the field has not been commensurate with the importance and urgency of the problem, owing to a number of factors; in particular insufficient co-ordination and co-operation between the organizations concerned, their limited authority and membership, and the small degree of participation in this field on the part of many developing countries. Third, the desire that harmonization and unification should be substantially co-ordinated, systematized and accelerated, and a broader participation secured in furthering progress in this area.[178]

The General Assembly, following upon some negotiations and compromises[179] in December 1966 established UNCITRAL. It was initially composed of twenty-nine member States,[180] but was subsequently in December 1973 increased to thirty-six,[181] distributed geographically. The object of UNCITRAL was laid down as being that of the promotion of the progressive harmonization and unification of the law of international trade. UNCITRAL's functions were enumerated as:

> (a) *Co-ordinating the work of organizations active in this field and encouraging co-operation among them;*
>
> (b) *Promoting wider participation in the existing international conventions and wider acceptance of existing model and uniform laws;*

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[178] Ibid., at p. 65.

[179] Robert Rosenstock "UNCITRAL--A Sound Beginning" 62 Am. J. Int'l. L. at p. 937 (1968).

[180] 1 UNCITRAL Y.B. at pp. 65-66.

[181] G. A. Res. 3108(XXVIII) December, 1973--U.N. Doc. A/9617 at p. 2.

> (c) *Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration where appropriate with organizations operating in this field;*
>
> (d) *Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade;*
>
> (e) *Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade;*
>
> (f) *Establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development [UNCTAD];*
>
> (g) *Maintaining liaison with other United Nations organs and agencies concerned with international trade;*
>
> (h) *Taking any other action it may deem useful to fulfill its functions.*[182]

It may be of some importance to indicate that during the debates in the Sixth Committee[183] and in UNCITRAL,[184] the general view was not too favourable in defining the term "progressive development of international trade law". In fact, many delegates felt that it was not essential at this stage to even formulate a definition of international trade law. The purpose, no doubt, was for many member States not to restrict the latitude of the Commission in the carrying out of its work, by providing it with the necessary flexibility (in order to assist the developing countries in their efforts to increase international trade).

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[182] 1 UNCITRAL Y.B. at p. 66.

[183] Ibid., at p. 90.

[184] Ibid., at p. 74.

Although UNCITRAL was created in 1966, its members were only elected by the General Assembly in October 1967.[185] At its First Session in 1968 UNCITRAL selected a wide range of topics under various categories falling within the field, considered by it as those most frequently related to the problems of world trade, requiring attention.[186] From this list, UNCITRAL selected the following as the priority topics:[187] International Sale of Goods; International Payments; International Commercial Arbitration, and International Shipping Legislation.[188] Within the field of International Sale of Goods, UNCITRAL undertook an examination of the subject-matter of the Uniform Rules of the law governing the International Sale of Goods;[189] as well as Time-Limits and limitations (prescription).[190] Whilst under International Payments, it examined the creation of a new negotiable instrument.[191] As for International Commercial Arbitration, UNCITRAL devoted time to the most important problems concerning the application and interpretation of the existing conventions and other related problems in this area,[192] as well as promoting the wider acceptance of the United Nations

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[185] Ibid., at p. 72.

[186] Ibid., at pp. 78; 83; 90; 92; 108-110 and 127.

[187] Idem.

[188] This was added as a priority topic during UNCITRAL's Second Session in 1969--1 UNCITRAL Y.B. at p. 110.

[189] Register of Texts of CONVENTIONS AND OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW Volume I, U.N.P. Sales No.: E.71.V.3. at pp. 39-63.

[190] 1 UNCITRAL Y.B. at p. 79.

[191] Ibid., at pp. 105-106, 141-142.

[192] Ibid., at pp. 78, 80-81.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.[193] Under International Shipping Legislation, UNCITRAL decided to examine the subject-matter of bills of lading.[194]

It is clear from the foregoing that UNCITRAL, having deliberately decided to use Working Groups, Special Rapporteurs and other working methods,[195] has thereby allowed itself a great deal of liberty in carrying out its responsibilities. Also, of some significance, is the provision that UNCITRAL "shall bear in mind the interests of all peoples, and particularly those of the developing countries in the extensive development of international trade."[196]

Mindful of this certain general legal rules are next dealt with by us which are particularly applicable to the conduct of international trade. We commence with an examination of the General Agreement on Tariffs and Trade, since it has been described as consisting of a code of general rules for the conduct of international trade.

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[193] 330 UNTS 38.

[194] 2 UNCITRAL Y.B., U.N.P. Sales No.: E.72.V.4, at p. 11 (1971).

[195] E. Allan Farnsworth "UNCITRAL and the Progressive Development of International Trade" in Fabricus INTERNATIONAL TRADE at pp. 148-155.

[196] 1 UNCITRAL Y.B. at p. 66.

CHAPTER III

THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)

1. *BACKGROUND*

2. *MOST-FAVOURED-NATION-CLAUSE--NON-DISCRIMINATION*
   - 2.1 *Origin*
   - 2.2 *League of Nations*
   - 2.3 *United Nations*
   - 2.4 *Egalitarian Character of MFN Clause*

3. *NATIONAL TREATMENT AND NON-TARIFF BARRIERS*

4. *TARIFF NEGOTIATIONS AND TARIFF CONCESSIONS*
   - 4.1 *Kennedy Round*
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5. *DEVELOPING COUNTRIES AND GATT*
   - 5.1 *Position of the Developing Countries*

6. *GENERALIZED SYSTEM OF PREFERENCES*

Overview

This chapter describes the emergence of the General Agreement as a general code for the conduct of international trade. The orientation of GATT towards a free-enterprise economic system was inherent in its basic provisions, and elements of free-trade theory were supposed to have influenced its formation. The underlying assumption of the GATT tariff system is that imports and exports are to be carried out under a free-market economy. It follows from this that countries that have centrally-planned economies would necessarily have to adapt their trading patterns in order to participate in GATT. There are few developing countries that can be said to possess all the attributes of either a free-market economy or for that matter a centrally-planned economy.

The fundamental principle of general most-favoured-nation (MFN) treatment--the so-called embodiment of "non-discrimination" in GATT--is treated in this chapter in some detail. The central commitment in the General Agreement is the essential obligation to accord MFN treatment. It was firmly believed at that time that the MFN clause was the best means of correcting past errors and upholding non-discrimination and thereby ensuring equality of treatment within the then prevailing free-trade philosophy. But the obligation of non-discrimination and MFN treatment was not considered absolute since exceptions were permitted by the General Agreement. The obligation of "national treatment" within the General Agreement means that imported goods are to be accorded the same treatment as goods of local origin with regard to government regulations and taxation.

The question of tariff negotiations also had to be considered. With successive tariff reductions resulting from the various Trade Conference or Rounds, the importance of non-tariff barriers gained prominence and called for urgent negotiations for their abolition. The special provisions in the General Agreement relating to the developing countries need to be evaluated in order to ascertain whether the undertaking of trade expansion in favour of the developing countries has been adequately discharged and whether the measures provided in the General Agreement are consonant with the goals and aspirations of the developing countries. According to the spokesmen of the developing countries, GATT is essentially a rich man's club, and its rules not fully relevant to their requirements. In their view immediate adjustment of the GATT rules in their favour is imperative for the continued validity of these rules. With this perspective on GATT we are in substantial agreement. Nevertheless, it needs to be emphasized that this so-called "temporary agreement" is still one of the principal regulating agencies for world trade and the current 1975 trade negotiations in Geneva under the auspices of GATT are of vital importance to the developing countries.

1. BACKGROUND

The general Agreement came into existence on the 1st January, 1948[1] as a provisional measure pending the establishment of the International Trade Organization (ITO) by the ratification of the Havana Charter.[2] When the United States did not ratify[3] the Havana Charter, the provisional existence of GATT was extended by the consent of the CONTRACTING PARTIES.[4] It has since then continued as an international organization[5] functioning in the name of the CONTRACTING

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[1] The General Agreement has never come into force (although Article XXVI does make provision for the acceptance of the General Agreement), being applied by a "Protocol of Provisional Application"--55 UNTS 308.

[2] United Nations Conference on Trade and Employment, Havana, Cuba. November 21, 1947 to March 24, 1948 FINAL ACT AND RELATED DOCUMENTS--U.N. Doc. E/Conf. 2/78 (1948).
See, also Wilcox TRADE CHARTER at pp. 231-327.

[3] Gardner STERLING - DOLLAR at p. 378.

[4] When the term CONTRACTING PARTIES in capitals are used this refers to the signatories as an entity.
Also, reference should be made to Article XXV as well--Kenneth W. Dam THE GATT--LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (hereinafter cited as Dam GATT) at pp. 434-435 (1970).

[5] The General Agreement itself makes no mention of a Secretariat Originally, it was hoped that the ITO Secretariat would service GATT and at that time the Interim Commission for the International Trade Organization (ICITO), which had an Executive-Secretary appointed at the Havana Conference, performed the services of a Secretariat for the CONTRACTING PARTIES. Protocols of amendment in 1955 (brought into force in 1957) made changes in the General Agreement, thereby making reference for the first time to the Executive-Secretary to the CONTRACTING PARTIES. At the twenty-second session of the CONTRACTING PARTIES the title was changed to the Director-General--John H. Jackson WORLD TRADE AND THE LAW OF GATT (hereinafter cited as Jackson WORLD TRADE) at pp. 145-151 (1969).

PARTIES. GATT began with twenty-three original signatories,[6] but as of April 1975 there were over eighty members.[7] Also, over 70 per cent of world trade is accounted for by countries which are GATT members.[8] It should be mentioned that the United States participation in GATT rests on the President's Executive Authority under the then Trade Agreements Act, 1934 as amended[9] (which did not require Congressional approval).

The structure of the General Agreement[10] is divided into four parts. The Preamble states the objectives of the General Agreement as being those of "raising the standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods." These objectives are to be achieved "by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce."[11]

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[6] 55 UNTS 308 at pp. 312-315 (1947).

[7] As of April, 1975 there were 83 member countries--GATT ACTIVITIES IN 1974, Sales No.: GATT 1975/2, at p. 56 (1975).

[8] THE ACTIVITIES OF GATT 1967/68, Sales No.: GATT/1969-2, at p. 5 (1969).

[9] Carl H. Fulda and Warren F. Schwartz CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL TRADE AND INVESTMENT (hereinafter cited as Fulda and Schwartz CASES) at pp. 179-182 (1970). Also, see Trade Act of 1974, Public Law No. 93-618, 88 Stat. 1978.

[10] 55 UNTS 194.

[11] Dam at p. 391.

In Part I (Articles I and II) is the outline of the essential obligation to accord most-favoured-nation (hereinafter referred as MFN) treatment and to give effect to schedules of tariff concessions (subject to certain stated exceptions). The purpose of Part II (Articles III to XXIII) is basically to set out supplementary trade rules (so as to prevent the tariff concessions granted from being nullified)--such as the elimination of quantitive restrictions, national treatment, etc. This Part also contains many of the exceptions and safe-guards. On the other hand, Part III (Articles XXIV to XXXV) is largely concerned with matters which can be generally described as administrative. Part IV[12] (Articles XXXVI to XXXVIII), as its title--Trade and Development--clearly indicates, is primarily devoted to the outlining of the principles and objectives applicable in this area.

As indicated previously much of the General Agreement was taken verbatim from the draft ITO Charter. As well GATT (according to Article XXIX) was expressly tied to the prospective ITO.[13] Accordingly the Geneva Conference of April-October, 1947 was most relevant from the point of view of GATT, although all preparatory work up to that time on the draft ITO Charter was also of some significance. Whilst carrying out the other function--of negotiating tariff concessions--the parties at the Geneva Conference were faced with a dilemma, the desire to immediately put into effect the tariff concessions obtained (so as to prevent market disruptions and speculation, as well as political opposition before the general agreement became operable); and the legal necessity for some countries to bring about changes in their laws inconsistent with the General Agreement. The solution applied was "provisional application" by a Protocol.[14] This Protocol permitted other Governments participating in the Geneva Conference until 30th June, 1948 to sign, and also allowed any nation to withdraw on sixty days notice.[15] The General Agreement is thus applied by means of this Protocol (which became effective when the eight countries mentioned in the Protocol signed[16]) or when similar Protocols were signed by other countries.[17] The General Agreement has never come into force,[18] even though Article XXVI provides for its acceptance and entry into force.[19]

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[12] GATT, Basic Instruments and Selected Documents (BISD) 13th Supplement at p. 2 (1965).

[13] Dam GATT at pp. 439-440.

The General Agreement rests on three essentials: (1) that trade should not be conducted on the basis of open-ended discrimination; (2) that tariff negotiations were of primary importance and that tariff concessions are to be made under the principle of reciprocity;[20] and (3) that there be commitments regarding other non-tariff barriers.

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[14] The Government of Australia, Belgium, Britain, Canada, France, Luxemburg, The Netherlands and United States of America "undertake, provided that this Protocol shall have been signed on behalf of all the foregoing Governments not later than 15 November, 1947, to apply provisionally on and after 1 January, 1948: (a) Parts I and III of the General Agreement on Tariffs and Trade, and (b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation. . . ."--55 UNTS 308.

[15] Idem.

[16] Jackson WORLD TRADE at pp. 898-899.

[17] Idem.

[18] Ibid., at p. 59.

[19] Ibid., at pp. 87-89.

2. MOST-FAVOURED-NATION CLAUSE--NON-DISCRIMINATION

It was generally believed that in strict economic terms discrimination between countries was objectionable because it contributed to the distortion of international trade.[21] It was argued that if there were no barriers to international trade, the consequences would be that "purchases can be made in the cheapest foreign market and sales in the most lucrative. Such a system promotes the international division of labour and encourages each country to specialize in the production of those things in which it enjoys the greatest comparative advantage."[22] From this it was suggested that it would be possible to achieve the maximum utilization of the world's resources and that capital would be attracted to those parts of the world economy "where it can make the greatest net contribution to productivity. At the same time, productivity would be stimulated by competitive forces acting through the operation of market mechanism."[23] It was with this philosophy in mind that the central commitment in the General Agreement was conceived to limit tariffs that could be applied mostly to the imports of specific goods, and the generalization of this to all GATT parties by the use of the MFN clause.[24]

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[20] Schwarzenberger "The Province. . ." op. cit. at pp. 409-410.

[21] Gardner STERLING-DOLLAR at p. 13.

[22] Idem.

[23] Ibid., at p. 14.

2.1 Origin

The MFN clause has been described as being medieval in origin,[25] and was used in the capitulations,[26] and later still, in the peace treaty after the First World War when "the victorious allies compelled the defeated States to grant them unilaterally the unconditional most-favoured-nation treatment."[27] The first example of the MFN clause in a treaty of commerce was believed to be found in a Treaty of Amity and Commerce between France and the United States concluded in 1778.[28] Also, the clause used to be "conditional", "unconditional" or "conditional upon material reciprocity"[29] in form. From about 1860 (after the conclusion of the Chevalier-Cobden Treaty between France and Britain[30]) the European practice was to use the clause unconditionally.[31] On the other hand the United States practice, at least until 1922, was to enter into conditional clauses.[32] The difference between the "unconditional" and "conditional" clause had been described in 1940 by the United States" Department of State as being, that:

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[24] The MFN clause in an agreement or treaty, usually between two States, generally contains the following: the promisor State undertakes an obligation towards the beneficiary State to treat it or its goods on a footing not inferior to the treatment it has been giving or will be giving to the most-favoured-third State in pursuance of a separate treaty or otherwise.

[25] 1969 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION Volume II (hereinafter cited as I.L.C. YEARBOOK) at p. 159.

[26] Ibid., at p. 161.

[27] Ibid., at p. 162.

[28] Ibid., at p. 161.

[29] Ibid., at pp. 161-162.

[30] British and Foreign State Papers, Vol. 50, at p. 13.

[31] 1969 I.L.C. YEARBOOK Vol. II at p. 162.

> *. . . under the most-favoured-nation clause in a bilateral treaty or agreement concerning commerce, each of the parties undertakes to extend to the goods of the country of the other party treatment no less favorable than the treatment which it accords to like goods originating in any third country. The unconditional form of the most-favoured-nation clause provides that any advantage, favor, privilege, or immunity which one of the parties may accord to the goods of any third country shall be extended immediately and unconditionally to the like goods originating in the country of the other party. In this form only does the clause provide for complete and continuous nondiscriminatory treatment. Under the conditional form of the clause, neither party is obligated to extend immediately and unconditionally to the like products of the other party the advantages which it may accord to products of third countries in return for reciprocal concessions; it is obligated to extend such advantages only if and when the other party grants concessions "equivalent" to the concessions made by such third countries. . . .*[33]

As for the clause "conditional upon material reciprocity", this is a variety of a "conditional" clause since what it stipulates is that treatment is conditional upon the granting of material reciprocity (either expressly stated or can be construed in that sense from the provisions of the treaty or agreement). An example of this is Article 3 of the Convention on conditions of residence and navigation between Sweden and France signed in February 1954 at Paris which indicates:

> *Subject to the effective application of reciprocity, the nationals of each of the High Contracting Parties residing in the territory of the other Contracting Party,*

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[32] Ibid., at pp. 161-163.

[33] Margery Whiteman DIGEST OF INTERNATIONAL LAW Volume 14 at p. 751 (1970).

> *shall have the right, in the territory of the other Contracting Party, under the same conditions as nationals of the most-favoured-nation, to engage in any commerce or industry, as well as in any trade or profession, that is not reserved for nationals.*[34]

Richard Snyder believes that for the United States the "conditional" clause was of benefit as long as she was a net importer and the primary purpose was to protect her growing industrial system. With the radical change in the position of the United States in the world economy after the First World War, the only means for her successful penetration of the international markets was through the elimination of discrimination against American products in those markets.[35] The mechanism pursued then after 1922 by the United States was the use of the "unconditional" clause. The 1922 Treaty of Rapallo[36] between Germany and the Soviet Union marked the Russian entrance on the scene of international trade. Commencing with that treaty, Russia concluded a series of agreements[37] on MFN basis.

2.2 League of Nations

The League of Nations, as previously mentioned, had in September 1924 established the Committee of Experts for the Progressive Codification of International Law, who in turn had appointed a Sub-Committee (composed of the former United States' Attorney General George Wickersham and Professor Barbosa de Magalhaes) to consider: "If it be possible; and in what degree, to reach an international agreement concerning the principal means of determining and interpreting the effects of the most-favoured-nation clause in treaties."[38] In his report George Wickersham concluded that "it would not seem necessary or desirable even if it were practicable to endeavour to frame a code provision to govern the case,"[39] and he recommended that in cases of dispute over interpretation of MFN clauses a reference should be made to one of The Hague tribunals.[40] He also felt that there was no necessity to have substantive rules of interpretation in regard to the clause, being satisfied with the ordinary rules of judicial interpretation.[41] On the other hand, Professor Magalhaes was of the view that

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[34] 228 UNTS 137 at p. 141.

[35] R. C. Snyder THE MOST-FAVOURED-NATION CLAUSE: AN ANALYSIS WITH PARTICULAR REFERENCE TO RECENT TREATY PRACTICE AND TARIFFS at p. 243 (1948).

[36] 19 LNTS 247.

[37] 1923 Danish-Russian Preliminary Agreement--18 LNTS 15
1925 German - Russian Treaty--53 LNTS 85
1930 British - Russian Temporary Commercial Agreement -- 101 LNTS 409.

> *. . .it was not only desirable but possible to reach international agreement [pertaining to the rules governing the clause and] he saw no legal, and more particularly no political obstacles in the way. [Such rules] which should be framed . . . in harmony with settled practice, would prove very useful to economic interests.*[42]

The Committee of Experts considered these reports at its third session in 1927 and decided that "the international regulation of these questions by way of a general convention, even if desirable, would encounter serious obstacles" and therefore the topic of MFN clause was not even placed on the list recommended by the Committee of Experts for codification.[43]

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[38] League of Nations Publications, 1927, V. 10 (C.205.M.79. 1927.V.)

[39] Ibid., at p. 14.

[40] Ibid., at pp. 14-15.

[41] Idem.

[42] Ibid., at p. 15.

The great depression in the early 1930s, as previously pointed out, brought about the abandonment of the gold standard (resulting in unstable exchange rates and the loss of free convertibility). As a result the world economy suffered a vicious circle of competitive devaluation, excessive protectionism, foreign exchange controls, bilateralism and the widespread use of quantitive restrictions in trade policy. With the virtual collapse of the international trade and payments system, there followed the emergence of discriminatory trading arrangements--Britain and other Commonwealth countries sought to solve the problem by a system of Imperial and Commonwealth Preferences.[44] The British example was taken up by most of the other colonial powers.

The sixty-four nation 1933 World Monetary and Economic Conference called by the Council of the League of Nations in London set up a Preparatory Commission of Experts, who under the heading of "Tariff and treaty policy" devoted special attention to the MFN clause as applied to commercial relations.[45] Its Sub-Commission on Commercial Policy in the report presented, outlined the problems of the MFN clause

> *. . . studied by the Sub-Commission especially from the point of view of exceptions that might be allowed in order to make its application more elastic and better suited to present conditions.*
>
> *There was a general opinion in favour of the maintenance of the most-favoured-nation clause, in its*

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[43] Ibid., at p. 1.

[44] Green "Commonwealth Preferences" Board of Trade Journal 1551 (31 December 1965).

[45] L.N. Doc. C.48.M.18. 1933, II at p. 30.

unconditional and unrestricted form--naturally with the usually recognised exceptions--stressing the points that it represents the basis of all liberal commercial policy; and that any general and substantial reduction of tariffs by the method of bilateral treaties is only possible if the clause is unrestricted; and that this method would avoid the constant resumption of negotiations.

However, certain delegations manifested a strong tendency in favour of allowing new exceptions in addition to those hitherto unanimously admitted, on the ground that, although the unconditional and unrestricted most-favoured-nation clause does, under normal conditions, secure for trade the indispensable minimum of guarantees and prevents arbitrary and discriminatory treatment, if insisted upon with too great rigidity, it may obstruct its own purposes in a period of crisis and difficulty such as we are now passing through.

As regards the nature of these exceptions, opinion differed very widely, and the following recommendations were made:

An exception in favour of collective conventions for the reduction of economic barriers, open to all countries;

An exception in favour of agricultural products;

An exception in favour of agreements arising out of historic ties between certain countries, subject to a favourable opinion by the Council of the League of Nations;

An exception in favour of agreements binding only those countries which undertake to accept a certain regime and to maintain a certain standard of living for their population;

An exception in favour of the agreements contemplated at Stresa and in favour of regional and collective agreements concluded under the auspices of the League of Nations;

An exception based on reciprocity and equitable treatment.[46]

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[46] L.N. Doc. C.435.M.220. 1933, II at pp. 22-23.

2.3 United Nations

The next significant development in this field is the post-Second World War period which witnessed a far-reaching attempt at the reorganization of the world economy. As mentioned the central commitment in the General Agreement was found in Article I (1)[47] which establishes the obligation of the general MFN treatment. The contents of the major MFN clause in the General Agreement have been described by John Jackson as "divisible into two concepts: (1) the scope of the clause, i.e., to what activity does it apply? and (2) the obligation of the clause, i.e., what does it require?"[48] He sets out the two concepts in the following way:

> *The scope . . .*
>
> (1) *Customs duties and charges of any kind imposed on or in connection with:*
>
> (a) *importation,*
> (b) *exportation, and*
> (c) *international transfer of payments for imports or exports;*
>
> (2) *The method of levying such duties and charges;*
>
> (3) *All rules and formalities in connection with:*
>
> (a) *importation and*
> (b) *exportation;*
>
> (4) *All matters referred to in Article III, paragraph 2, and Article III, paragraph 4 (which cover internal taxes and regulatory laws).*
>
> (5) *All of the above apply only to products.*
>
> . . . . .

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[47] Dam GATT at p. 392.

[48] Jackson WORLD TRADE at p. 256.

The second or "obligation" . . .

> *[A]ny advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.*[49]

This particular clause was held to have been modelled on the standard MFN clause drawn up by the League of Nations,[50] and the text was substantially similar to that found in the United States' "Suggested Charter for the International Trade Organization" submitted to the 1946 London First Session of the Preparatory Committee.[51] The objectives for the reconstruction of the world economy after the Second World War, it was felt, demanded the establishment of a multilateral system based on the general concept of the MFN clause. At that time it was firmly believed that the MFN clause was the best means of correcting past errors and upholding non-discrimination and thereby ensuring equality of treatment[52] within the framework inspired by the ideals of free trade.[53]

2.4 Egalitarian Character of MFN Clause

It should be pointed out that during this period the MFN clause had also developed an egalitarian character. Thus, in the Case Concerning

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[49] Ibid., at pp. 256-257.

[50] Ibid., at p. 252.

[51] U.N. Doc. E/PC/T/CII/25 at p. 2 (1946).

[52] Schwarzenberger "The Province . . ." op. cit. at p. 411.

[53] Eric Wyndham White "Order in International Trade Relations: the Role of the General Agreement on Tariffs and Trade" GATT Inf./128 (1969).

Rights of Nationals of the United States in Morocco (France v. U.S.A.)[54] the International Court of Justice interpreted the MFN clause found in the treaties before it in accordance with the intention of the parties and the general nature and purpose of the MFN clause, by stating that these treaties ". . . show that the intention of the most-favoured-nation clause was to establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned."[55] The essential idea behind the MFN clause was that equality of treatment could be attained by its application. It has been held that MFN treatment "transposes equality under international law into the economic field."[56]

As for the scope of the rights arising out of the clause, the beneficiary's right to MFN treatment extended to all favours given by the conceding State to a third State independently of the fact whether the favour granted originated in a treaty, in the practice of reciprocity or in the operation of the municipal law of the promisor.[57] This right, it has been held in the Anglo-Iranian Oil Company Case (Jurisdiction),[58] was created by the treaty embodying the MFN clause and not by the treaty between the conceding State and the third State, which was a res inter alios acta for the beneficiary. The International

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[54] 1952 International Court of Justice Reports 176.

[55] Ibid., at p. 192.

[56] Hector Gros Espiell "The Most Favoured Nation Clause" 5 Journal of World Trade Law 29 at p. 35 (1971).

[57] Lord McNair THE LAW OF TREATIES at p. 280 (1960).

[58] 1952 I.C.J. Rep. 93.

Court of Justice described this in the following way:

> The treaty containing the most-favoured-nation clause is the treaty upon which the United Kingdom must rely. It is this treaty which establishes the juridical link between the United Kingdom and a third-party treaty and confers upon that state the rights enjoyed by the third party. A third party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is res inter alias acta.[59]

Sir Gerald Fitzmaurice was of the opinion that "there can be little doubt that the Court's was the correct view as a matter of general principle."[60] In describing the relation between the treaty containing the MFN clause and the subsequent third-party treaty he observes "[I]f the later treaty can be compared to the hands of a clock that point to a particular hour, it is the earlier treaty which constitutes the mechanism that moves the hands round."[61]

The Ambatielos Case (Merits: Obligation to arbitrate)[62] also raised within the context of the MFN clause the question of the "ejusdem generis" rule. The Commission of Arbitration on the Ambatielos' claim (set up as result of the International Court's decision) in its March 1956 Award[63] affirmed the application of the ejusdem generis rule by stating that "the most-favoured nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates."[64] In applying the foregoing rule to the genus of "matters of commerce and navigation,"[65] the Award held that

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[59] Ibid., at p. 109

[60] Gerald Fitzmaurice "The Law and Procedure of the International Court of Justice, 1951-54: Points of Substantive Law Part II" 32 Brit. Y.B. Int'l L. 20 at pp. 87-88 (1957).

[61] Idem.

[62] Although the International Court of Justice had held (I.C.J. Rep.1952, p. 40) that it had no jurisdiction to deal with the Merits, at the same time it found it had jurisdiction to decide whether Britain was under an obligation to submit the dispute to arbitration and came to the conclusion that the matter should go to arbitration--I.C.J, Rep. 1953, p. 10.

[63] United Nations REPORTS OF INTERNATIONAL ARBITRAL AWARDS Volume XII, U.N.P. Sales No.: 1963.V.3., at p. 83. Also, 23 I.L.R. p. 306.

> *. . . "the administration of justice", which viewed in isolation, is a subject-matter other than "commerce" and "commerce and navigation", but this is not necessarily so when it is viewed in connection with the protection of the rights of traders.. Protection of the rights of traders naturally finds a place among the matters dealt with by treaties of commerce and navigation.*
>
> *Therefor it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must be necessarily excluded from the field of the application of the most-favoured-nation clause, when the latter includes "all matters relating to commerce and navigation".*[66]

Georg Schwarzenberger holds that with respect to the rules of international law pertaining to the MFN clause, the above three cases decided by the International Court of Justice are real "sedes materiae".[67]

It must be mentioned that the MFN clause has also been under discussion by the International Law Commission, when it was requested by several representatives at the Sixth Committee of the General

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[64] Ibid., at p. 107

[65] Article X of the 1886 Anglo-Greek Treaty read: "The Contracting Parties agree that, in all matters relating to commerce and navigation, any privilege, favour or immunity whatever which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State shall be extended immediately and unconditionally to the subjects or citizens of the other Contracting Party; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most-favoured-nation"--(1953) I.C.J. Rep. at p. 19.

[66] REPORTS OF INTERNATIONAL ARBITRAL AWARDS Vol. XII op. cit. at p. 107.

[67] Georg Schwarzenberger INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS Third Edition at p. 240 (1957).

Assembly in 1967 to deal with the MFN clause as part of the general law of treaties.[68] The International Law Commission, in view of the above interest, and in order to clarify the legal aspects of the MFN clause, decided to deal with it by the appointment of a Special Rapporteur.[69] At its twentieth session in 1968 the International Law Commission discussed the subject and considered that the focus should be "on the legal character of the clause and the legal conditions governing its application. . . . [The International Law Commission] to clarify the the scope and effect of the clause as a legal institution, in the context of all aspects of its practical application."[70] On the basis of the instructions given to him the Special Rapporteur presented a number of reports[71] and even prepared eight draft articles on the clause along with a commentary.[72] The International Law Commission discussed these draft articles at its twenty-fifth session in May-July 1973 and appointed a Drafting Committee.[73] The Drafting Committee presented its first Proposed Draft Articles,[74] dealing with expressions such as "granting State", "beneficiary State" and "third State"[75] (draft Article 2); the scope of the articles (draft Articles 1 and 3) was confined to treaties--as defined in the Vienna Convention on the Law of Treaties--between States; the MFN clause was defined as "a treaty provision whereby a State undertakes to accord most-favoured-nation treatment to another State in an agreed sphere of relations"[76] (draft Article 4); MFN treatment was defined as "treatment by the granting State of the beneficiary State or of persons or things in a determined relationship with that State, not less favourable than treatment by the granting State of a third State or of persons or things in the same relationship with a third State" (draft Article 5); the legal basis of MFN treatment was stated as being: "Nothing in the present articles shall imply that a State is entitled to be accorded most-favoured-nation treatment by another State otherwise than on the ground of a legal obligation" (draft Article 6) and as far as the source and scope of MFN treatment was concerned, the right of the beneficiary State to MFN treatment was anchored in the MFN clause, being the exclusive source of the beneficiary State's rights (draft Article 7).[77]

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[68] 1967 I.L.C. YEARBOOK Vol. II at p. 369.

[69] _Idem_.

[70] 1968 I.L.C. YEARBOOK Vol. II at p. 223.

[71] U.N. Doc. A/CN.4/257 and Add. 1, and A/CN.4/266.

[72] _Idem_.

[73] 1973 I.L.C. YEARBOOK Vol. I at pp. 59 _et seq_.

[74] _Ibid_., at pp. 183-187.

[75] _Ibid_., at p. 184.

As previously stated MFN clauses were generally to be found in bilateral agreements or treaties. In contradistinction to the bilateral approach, the General Agreement in fact utilized a multilateral MFN system. The advantages of this are vividly illustrated by John Jackson:

> *If a most-favoured-nation clause is generally inserted in bilateral trade treaties, then when nation A agrees with nation B to reduce tariffs on widgets, A may have to grant the same reduction to C under a prior treaty which has MFN. But A will be able to extract from B only such*

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[76] Idem.

[77] Ibid., at pp. 184-185.

> *reciprocal tariff reductions that compensate B's advantage received from A. C will get a windfall. This knowledge will inhibit A from offering very much to B in their negotiations, at least as to goods which are traded with nations other than B. The only way out of this dilemma is for A, B and C to negotiate "together". This GATT attempts to allow.*[78]

On the other hand, Georg Schwarzenberger believes that "the greater the number of parties to a multilateral agreement adopting the most-favoured-nation standard, the more meaningless this standard becomes"[79] because he feels in the case of multilateral agreements, third-parties are only the non-signatories.

Recently, the nature and effect of the clause has been described as having

> *. . . a harmonizing and levelling effect. Although until quite recently the clause appeared mostly in bilateral treaties, it now transcends the bilateralism of commercial relations and produces a tendency to multilateralism. Its effect is automatic. Since the provision ensuring favours to a third party applies automatically vis-a-vis the beneficiary, it renders the conclusion of new individual agreements superfluous. It can be linked to most diverse systems of economic policy,[80] to free trade as well as to protectionism. Embodied in commercial treaties, it creates favourable conditions for the development of mutual commercial relations between States. It consists of two main factors: the granting of favours and the elimination of discrimination.*[81]

Besides the above general obligation the General Agreement has numerous other provisions dealing with the rule of non-discrimination and MFN treatment. MFN treatment relating to traffic in transit is found in Article V (5);[82] for marks of origin in Article IX (1);[83] for quantitive restrictions in Article XIII (1).[84] In Article XVII (1)[85] is the provision for the application of the general principles of non-discriminatory treatment to the foreign purchases and sales of State-trading enterprises. These clauses along with the general obligation have been classed among "the provisions of GATT establishing the rule of non-discrimination."[86]

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[78] John H. Jackson "The Puzzle of GATT" 1 J.W.T.L. 131 at p. 145 (1967).

[79] Schwarzenberger "The Province. . ." op. cit. at p. 414.

[80] "The system of the most-favoured-nation treatment which creates a situation of equal rights for the States participating in international trade does not and cannot affect the economic system of the States"--1968 I.L.C. YEARBOOK Vol. II at p. 168.

[81]. Idem.

It has been correctly stated that

> *GATT is "riddled with exceptions", . . . there are a number of provisions that relax the GATT obligations under various circumstances. But arguably these provisions are essential to an institution as new (and therefore experimental) as GATT, which purports to regulate the complex and politically sensitive subject of international trade. The escape clauses and exceptions provide the necessary flexibility without which the General Agreement might never have been concluded or might never have endured in the face of the pressures that have buffeted it.*[87]

As stated, it is clear that the obligation of non-discrimination and MFN treatment was not an absolute one and exceptions were permitted by the General Agreement. These exceptions were either those provided for in the General Agreement itself or those granted by the CONTRACTING PARTIES.

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[82] Dam GATT at p. 399.

[83] Ibid., at p. 405.

[84] Ibid., at p. 411.

[85] Ibid., at pp. 417-418.

[86] Jackson WORLD TRADE at p. 535.

[87] 1970 I.L.C. YEARBOOK Vol. II at p. 220.

We first deal with the former. The historical or "grandfather" type clause preferences can be divided under four headings: (1) excepted preferences listed in Article I--those that do not require the elimination of certain preferences relating to import duties or charges in force on established base dates; (2) possible "existing legislation" preferences in matters of internal taxation and regulation under Article III (2)[88] and (4)[89] (this is expressly made subject to the Protocol of Provisional Application provision[90]); (3) preferential quota restrictions expressly excepted in Article XIV (5) by reference to Annex A;[91] (4) preferences expressly excepted by a later protocol of accession or provisional accession.[92]

Other exceptions under this category are the so-called "general exceptions" which apply to any GATT obligation, such as the general public morals and health regulations under Article XX;[93] the security exceptions under Article XXI,[94] and the escape clause--emergency action affecting imports--under Article XIX.[95] Then there are the explicit exceptions referring primarily to MFN type obligations, which include the Article XIV[96] exception for quantitive restriction in case of balance of payments difficulties; retaliatory powers under Articles XII (4)[97] and XVIII (21)[98] for the discriminatory application of quantitive restrictions; the Article XXIV[99] exception for customs union, free trade areas, frontier traffic, etc.; Article XXXV[100] non-application provision and Article XXIII[101] suspensive power. Also reference should be made to the anti-dumping and countervailing duties provisions under Article VI (2) and (3).[102] By its very nature, anti-dumping and countervailing duties cannot be other than discriminatory.

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[88] Dam GATT at p. 396.

[89] Idem.

[90] Ibid., at pp. 396 and 467.

[91] Ibid., at pp. 448-449.

[92] Ibid., at pp. 341-350.

[93] Ibid., at pp. 427-428.

[94] Ibid., at pp. 428-429.

[95] Ibid., at pp. 426-427.

[96] Ibid., at pp. 413-414.

As for the exceptions granted by the CONTRACTING PARTIES, there is the provision for waivers authorizing discriminatory treatment under Article XXV (5);[103] and preferences in favour of developing countries under the same provision, as well as under Article XXXVI (8).[104]

It is held that one object of MFN treatment "is that it reduces or eliminates the legal consequences of product origin, often making it unnecessary for a custom's official to establish origin."[105]

3. NATIONAL TREATMENT AND NON-TARIFF BARRIERS

According to Georg Schwarzenberger the "standard of national treatment provides for inland parity, that is to say, equality of treatment between nationals and foreigners."[106] He gives as an example of this the Reciprocity Treaty of 5 June 1854[107] between Britain and the United States which established that in "return for the grant of tariff reciprocity, and subject to a right of revocation upon notice, the British government granted freedom of navigation on the river St. Lawrence and its canals to the inhabitants of the United States on the basis of the standard of national treatment."[108] Another example of this can be found in The Ambatielos Case where the Anglo-Greek Treaty of Commerce and Navigation of 1886 in Article XV in paragraph 3 provides as follows:

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[97] Ibid., at p. 413.

[98] Ibid., at p. 425.

[99] Ibid., at pp. 431-434.

[100] Ibid., at p. 442.

[101] Ibid., at p. 441

[102] Ibid., at p. 400.

[103] Ibid., at pp. 434-435.

[104] Ibid., at p. 444.

[105] Jackson WORLD TRADE at p. 207.

> *The subjects of each of the two Contracting Parties in the dominions and possessions of the other shall have free access to the Courts of Justice for the prosecution and defence of their rights, without conditions, restrictions or taxes beyond those imposed on native subjects, and shall, like them, be at liberty to employ, in all causes, their advocates, attorneys or agents, from among the persons admitted to the exercise of those professions according to the laws of the country.*[109]

In the General Agreement "national treatment" means that imported goods will be accorded the same treatment as goods of local origin with regard to governmental regulation and taxation. The "national treatment" obligation is primarily centred in Article III,[110] but there are also provisions found in Article IV[111], (relating to cinematograph films), as well as Article XVI[112] (concerning subsidies and the border tax adjustment question which are closely tied to national treatment).

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[106] Schwarzenberger "The Province . . ." op. cit. at p. 410.

[107] British and Foreign State Papers, Vol. 44 at p. 28.

[108] Georg Schwarzenberger ECONOMIC WORLD ORDER? A Basic Problem of International Economic Law at p. 14 (1970).

[109] I.C.J. Rep. 1953 at p. 20.

[110] Dam GATT at pp. 396-397.

Article III (1) lays down the general obligation regarding the use of internal governmental measures to protect domestic products, while Article III (2) specifies that products imported shall not be subject to internal taxes or other charges in excess to those applied to domestic products and further internal taxes or other charges shall not be applied contrary to the principles set out under paragraph 1 above. Kenneth Dam holds that paragraph 1 does not set out principles in fact but merely states that internal taxes should not be used "so as to afford protection to domestic production,"[113] besides, in his view the scope is further restricted by the Interpretive Note which deals with the question of competitive and substitutable products.[114] It is important to remember that the obligation to exclude discriminatory internal taxes and other internal charges was not confined to Schedule items but applied to all goods.

Right from the beginning there were problems in deciding what amounted to an "internal tax"; "other charges"; "like products"; "governmental procurement"; etc. In fact, an Interpretive Note was added in Annex I[115] which indicated that just because a tax is collected or enforced at the time or point of importation it can nevertheless still be regarded as being an internal tax or other internal charge. Further, the article referred not only to internal taxes and other charges, but also to laws, regulations and requirements affecting internal sale, offer for sale, purchase, transportation, distribution or use of products, and internal quantitive regulations. It is clear that in all of this, the question of origin of goods was of some importance, which meant that there were more problems in also determining what amounted to "origin of goods" as well.

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[111] Ibid., at p. 398.

[112] Ibid., at pp. 416-417.

[113] Ibid., at p. 118.

[114] Idem.

[115] Ibid., at p. 453.

Also, the CONTRACTING PARTIES in 1957 adopted a report which said that "requirements going beyond the obligation to indicate origin would not be consistent with the provisions of Article III, if the same requirements did not apply to domestic producers of like products."[116]

It must be pointed out that Article III, like the other provisions found in Part II, is subject to the Protocol of Provisional Application, and therefore, does not prohibit the continued application of discriminatory measures in effect on base dates (or on those dates made applicable in protocols of accession). However, although discriminatory internal taxes and other charges in effect can be continued, they cannot be increased.

Government procurements for governmental purposes and not for commercial resale were exempt from national treatment obligations (Article III (8)). Also, Article III (3) permits internal tax discrimination specifically authorized under a previous trade agreement in force before the General Agreement until such time as release from such obligation can be obtained. Further, in the Interpretive Note is also found an exemption which permits the continuation of internal taxes imposed by local governments (which is subject to Article XXIV (12)[117]) inconsistent with Article III.[118]

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[116] GATT, BISD 5th Supp. at p. 105 (1957).

As for non-tariff barriers,[119] it is stated that "a contracting party is not required to lower tariffs in the absence of special agreement, the general principle with respect to non-tariff barriers is one of immediate abolition.[120] The General Agreement does not contain a general provision on non-tariff barriers but in fact deals with certain types of non-tariff barriers separately, for instance, quantitive restriction in Article XI;[121] anti-dumping and countervailing duties in Article VI;[122] fee charges connected with importation and exportation by custom's officials under Article VIII;[123] marks of origin in Article IX;[124] publication and administration of trade regulations in Article X;[125] subsidies in Article XVI;[126] state-trading in Articles II (4),[127] III (4)[128] and XVII;[129] governmental assistance for economic development in Article XVIII.[130]

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[117] Dam GATT at p. 434.

[118] Ibid., at pp. 396-397.

[119] Non-tariff barriers has been defined as "any law, regulation, policy or practice of a government other than an import duty that has a restrictive effect on trade"--Kelly "Non-Tariff Barriers" in Bela Balassa (ed.) STUDIES IN TRADE LIBERALIZATION: PROBLEMS AND PROSPECTS FOR THE INDUSTRIAL COUNTRIES at p. 266 (1967).

[120] Dam GATT at p. 19.

[121] Ibid., at pp. 407-408.

[122] Ibid., at pp. 400-402.

[123] Ibid., at p. 404.

[124] Ibid., at p. 405.

[125] Ibid., at pp. 406-407.

[126] Ibid., at pp. 416-417.

In GATT the Committee on Trade in Industrial Products[131] had been assigned to oversee non-tariff barriers. In 1967 the CONTRACTING PARTIES in a major policy statement concerning one of the objectives of future GATT work stated:

> *An inventory of non-tariff and para-tariff barriers affecting international trade will be drawn up. Contracting parties should, accordingly, notify the secretariat by 30 April 1968 of the non-tariff barriers, both governmental and non-governmental, which they wish to be included in the inventory. The secretariat will consolidate the notifications received and transmit these to the Committee by 30 May 1968 for analysis. On the basis of the report of the Committee, the Council is instructed to establish appropriate machinery to deal with the problems identified with the inventory.*[132]

The secretariat inventory compiled from the notification received listed 800 non-tariff barriers[133] utilized by GATT member countries. The notifications have been divided by the Secretariat into five categories:

> (1) *Government participation in trade. This category includes production and export subsidies, government*

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[127] Ibid., at p. 394.

[128] Ibid., at p. 396.

[129] Ibid., at pp. 417-418.

[130] Ibid., at pp. 418-426.

[131] GATT Doc. L/2967.

[132] Jackson WORLD TRADE at pp. 519-520.

[133] GATT ACTIVITIES IN 1969/70 Sales No.: GATT 1970--4 at p. 14 (1970).

procurement practices, state-trading, and trade-diverting investment.

(2) Customs and administrative entry procedures. These are the so-called "para-tariff" barriers; they include valuation procedures, questions of customs classification, anti-dumping practices, and documentation requirements.

(3) Standards involving imports and domestic goods. This covers health and safety regulations imposing technical or testing requirements, and rules on packaging, labelling or marking.

(4) Specific limitations on imports and exports, such as quantitive import restrictions, bilateral agreements, export restraints and licensing arrangements.

(5) Restraints on imports and exports through the price mechanism, such as prior deposits, variable levies and fiscal adjustments.[134]

An example of a non-tariff barrier is the so-called "American Selling Price (ASP)[135] system. This system applies only to imports of benzenoid or coal-tar chemicals; rubber-soled footwear; canned clams and wool-knit gloves.[136] The customs valuation provides that "whenever such imports compete with a domestic product, the rate of duty shall be based not on the value of the imported good, which is the normal procedure, but rather on the value of the domestic product."[137] The ASP, although inconsistent with Article VI (2), is permitted by the existing legislation provision of the Protocol of Provisional Application. In urging its elimination during the Kennedy Round reliance was placed on the grounds that the ASP provides[138] a very high level of protection in comparison with the duties protecting other American domestic industries and virtually all duties on foreign products; it is inconsistent with the customs practice of all foreign trading countries in industrial goods; it provides the American manufacturer with unique and unfair advantages and the ASP does not permit a foreign exporter to know at the time of the contract whether the goods will be subject to ASP and what the ASP will be. In return for European concessions on certain non-tariff barriers the United States agreed, subject to Congressional approval,[139] to eliminate the ASP on three of the products--bezenoid chemicals; canned clams and wool-knit gloves--at the Kennedy Round.[140]

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[134] Ibid., at p. 15.

[135] Fulda and Schwartz CASES at pp. 212-214.

[136] Ibid., at p. 214.

[137] Ibid., at pp. 213-214.

[138] Ibid., at pp. 219-220.

As tariffs were reduced (and the Kennedy Round was credited with bringing about many reductions[141]) the significance of non-tariff barriers to international trade gained greater prominence. Although it is clear that an internal tax which discriminates against imported goods can be as effective a protectionist substitute as a tariff; just as governmental regulations, utilizing subtle devices like labelling and packaging requirements can similarly be protectionist in scope; it is almost impossible to measure such non-tariff obstacles distortive effect.

4. TARIFF NEGOTIATIONS AND TARIFF CONCESSIONS

At the First Session of the Preparatory Committee in 1946 in

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[139] John B. Rehm "Developments in the Law and Institutions of International Economic Relations--The Kennedy Round of Trade Negotiations" 62 Am. J. Int'l. L. 403 at pp. 418-420.

[140] Fulda and Schwartz CASES at pp. 209-217.

[141] Dam GATT at pp. 56-57.
See, also Fulda and Schwartz CASES at pp. 204-208.

London, rules for the conduct of multilateral negotiations were drawn up,[142] and between April and October 1947 in Geneva the first multilateral tariff conference (or round) took place. The General Agreement contained the results of that first round of tariff negotiations. The procedure adopted at that first conference required the holding of simultaneous bilateral negotiations between pairs of countries, with all participants being informed of the progress of the negotiations. In this way the resulting concessions were generalized among all participants.[143] An interesting feature was the fact that countries, in deciding the concessions they were prepared to offer, were able to take note of the indirect benefits they might expect to gain as a result of all bilateral negotiations. It must be noted that none of the concessions were final until the end of the conference, when an appraisal by each participant could be made of the totality of his concessions with the totality of concessions of all other parties. In this way at Geneva in 1947 twenty-three countries completed some 123 bilateral agreements in seven months, and at that time it was believed that the concessions made were to affect about half of world trade.[144]

The second round of tariff negotiations was held in Annecy in 1948, where 147 bilateral agreements were completed in five months.[145]

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[142] "Multilateral Trade Agreement Negotiations" Annexure 10--PREPARATORY COMMITTEE LONDON FIRST SESSION--U.N. Doc. E/PC/T/34.

[143] Dam GATT at pp. 62-63.

[144] Gerard Curzon MULTILATERAL COMMERCIAL DIPLOMACY: THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND ITS IMPACT ON NATIONAL COMMERCIAL POLICIES AND TECHNIQUES at p. 81 (1965).

[145] Idem.

The third tariff round was held in Torquay in 1951, when 147 bilateral agreements were completed between thirty-one countries.[146] During this third conference, the question of the so-called "low tariff" countries arose, since in the first two rounds the Benelux and the Scandanavian countries, having bound their tariffs at low levels, had little to offer in the way of tariff reductions in further negotiations. On the other hand the so-called "high tariff" countries were not prepared to make further reductions vis-a-vis these countries merely in return for a re-binding of the reductions already conceded.[147] This problem led the CONTRACTING PARTIES to review the effectiveness of the negotiating procedures at their fourth session in 1950.[148]

The fourth round was held in Geneva in 1956,[149] and the fifth conference lasted from September 1960 to July 1962 and fell into two parts.[150] The first part concerned the re-negotiations then taking place with the European Economic Community, while the second part of the conference was called the "Dillon Round".[151]

4.1 Kennedy Round

All previous negotiations including the Dillon Round had been conducted on a product-by-product basis, and were almost entirely confined to tariffs. The experience gained in these tariff conferences led the CONTRACTING PARTIES to conclude that the traditional procedures for tariff negotiations were no longer adequate to face the changing conditions of world trade. When the 1964 seventh conference or the Kennedy Round was held,[152] the pre-conference Ministerial meeting in May, 1963, laid down directives, which contained, inter alia:

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[146] Idem.

[147] Dam GATT at pp. 61-68.

[148] GATT Doc. CP.4/1-45.

[149] GATT BISD 4th Supp. 74.

[150] GATT BISD 8th Supp. 114.

[151] In the Dillon Round, 4,400 tariff concessions were made, of this 160 were of any export interest to the developing countries.--Dam GATT at p. 230.

> (i) *to hold comprehensive trade negotiations starting in 1964, with the widest possible participation,*
>
> (ii) *that the negotiations should cover all classes of products, including agricultural and primary products; and should deal with both tariff and non-tariff barriers,*
>
> (iii) *that the tariff negotiations should be based upon a plan of substantial linear, across-the-board tariff reductions, with a bare minimum of exceptions which should be subject to confrontation and justification,*
>
> (iv) *that the trade negotiations should provide for acceptable conditions of access to world markets for agricultural products,*
>
> (v) *that there was a problem for certain countries with a special economic or trade structure such that equal linear tariff reductions may not provide an adequate balance of advantages, and*
>
> (vi) *that every effort shall be made to reduce barriers to exports of the less-developed countries, but that the developed countries cannot expect to receive reciprocity from the less-developed countries.*[153]

The negotiations between the developed countries were held on the basis of reciprocity and covered mostly items other than agricultural products. Also, the Kennedy Round was concluded on the basis of the across-the-board or linear approach, and the negotiations dealt with both tariff and non-tariff barriers. Further, in March 1965, special procedures for the participation of the developing countries were agreed upon; this in fact provided that the developing countries intending to participate in the negotiations should receive details of offers made by the developed countries on items of export interest to them, before the developing countries themselves indicated the contribution they would make to the objectives of the negotiations.[154] A special committee was also struck to oversee the negotiations involving developing countries.

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[152] GATT BISD 12th Supp. 36.

[153] THE ACTIVITIES OF GATT 1964/65, Sales No.: GATT/1965-4, at pp. 17-18 (1965).

4.2 Tokyo Round

The ministerial meeting held during September 1973 issued the "Tokyo Declaration" (in anticipation of the Tokyo Round) which stated:

> 1. . . . *The Ministers hope that the negotiations will involve the active participation of as many countries as possible. . . .*
>
> 2. *The negotiations shall aim to:*
>
> *--achieve the expansion and ever-greater liberalization of world trade and improvement in the standard of living and welfare of the people of the world, objectives which can be achieved, inter alia, through the progressive dismantling of obstacles to trade and the improvement of the international framework for the conduct of world trade.*
>
> *--secure additional benefits for the international trade of developing countries so as to achieve a substantial increase in their foreign exchange*

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[154] Ibid., at p. 20.

earnings, the diversification of their exports, the acceleration of the rate of growth of their trade, taking into account their development needs, an improvement in the possibilities for these countries to participate in the expansion of world trade and a better balance as between developed and developing countries in the sharing of the advantages resulting from this expansion, through, in the largest possible measure, a substantial improvement in the conditions of access for the products of interest to the developing countries and, wherever appropriate, measures designed to attain stable, equitable and remunerative prices for primary products. To this end, co-ordinated efforts shall be made to solve in an equitable way the trade problems of all participating countries, taking into account the specific trade problems of the developing countries.

3. To this end the negotiations should aim, inter alia, to:

(a) conduct negotiations on tariffs by employment of appropriate formulae of as general application as possible;

(b) reduce or eliminate non-tariff measures or, where this is not appropriate, to reduce or eliminate their trade restricting or distorting effects, and to bring such measures under more effective international discipline;

(c) include an examination of the possibilities for the co-ordinated reduction or elimination of all barriers to trade in selected sectors as a complementary technique;

(d) include an examination of the adequacy of the multilateral safeguard system, considering particularly the modalities of application of Article XIX, with a view to furthering trade liberalization and preserving its results;

(e) include, as regards agriculture, an approach to negotiations which, while in line with the general objectives of the negotiations, should take account of the special characteristics and problems in this sector;

(f) treat tropical products as a special and priority sector.

4. The negotiations shall cover tariffs, non-tariff barriers and other measures which impede or distort international trade in both industrial and agricultural products, including tropical products and raw materials, whether in primary form or at any stage of processing including in particular products of export interest to developing countries and measures affecting their exports.

5. The negotiations shall be conducted on the basis of the principles of mutual advantage, mutual commitment and over-all reciprocity, while observing the most-favoured-nation clause, and consistently with the provisions of the General Agreement relating to such negotiations. Participants shall jointly endeavour in the . . . negotiations to achieve, by appropriate methods, an overall balance of advantage at the highest possible level. The developed countries do not expect reciprocity for commitments made by them in the negotiations to reduce or remove tariff and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of the trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. The Ministers recognize the need for special measures to be taken in the negotiations to assist the developing countries in their efforts to increase their export earnings and promote their economic development and, where appropriate, for priority attention to be given to products or areas of interest to developing countries. They also recognize the importance of maintaining and improving the Generalized System of Preferences. They further recognize the importance of the application of differential measures to developing countries in ways which will provide special and more favourable treatment for them in areas of the negotiation where this is feasible and appropriate.

6. The Ministers recognize that the particular situation and problems of the least developed among the developing countries shall be given special attention, and stress the need to ensure that these countries receive special treatment in the context of any general or specific measures taken in favour of the developing countries during the negotiations.

7. The policy of liberalizing world trade cannot be carried out successfully in the absence of parallel efforts to set up a monetary system which shields the world economy from the shocks and imbalances which have previously occurred. . . .

> *. . . Efforts in these two fields will thus be able to contribute effectively to an improvement of international economic relations, taking into account the special characteristics of the economies of the developing countries and their problems.*
>
> *8. The negotiations shall be considered as one undertaking, the various elements of which shall move forward together.*
>
> *9. Support is reaffirmed for the principles, rules and disciplines provided for under the General Agreement. Consideration shall be given to improvements in the international framework for the conduct of world trade which might be desirable in the light of progress in the negotiations. . . .*
>
> *10. A Trade Negotiations Committee is established, with authority, taking into account the present Declaration, inter alia:*
>
> *(a) to elaborate and put into effect detailed trade negotiating plans and to establish appropriate negotiating procedures, including special procedures for the negotiations between developed and developing countries;*
>
> *(b) to supervise the progress of the negotiations.*[155]

The eighth conference or Tokyo Round commenced with the meeting of the Trade Negotiations Committee in late October 1973. The Committee also met in February 1974 to deal with procedural arrangements and established six specialized sub-groups (whose responsibilities coincided with the six sub-headings included in paragraph 3 of the Tokyo Declaration).[156]

Some mention must be made about the technique of negotiations for the Tokyo Round: As mentioned previously the Kennedy Round adopted the linear approach, but criticism had been directed against this on the grounds that it could be used to achieve different objectives, especially the problem of tariff disparities--that an equal percentage cut in tariff represents a greater sacrifice of protection by a "low-tariff" than by a "high-tariff" country. Another method, advocated by some countries, is the technique of tariff harmonization (so that exceptionally high tariffs can be eradicated).

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[155] GATT ACTIVITIES IN 1973, Sales No.: GATT 1974/3, at pp. 5-10 (1974).

[156] GATT ACTIVITIES IN 1974, Sales No.: GATT 1975/2, at pp. 7-11 (1975).

> Tariff harmonization techniques can be classified in four general categories.
>
> One is reduction of rates by an agreed percentage that would depend on the initial height of the tariff in the country concerned. This method would reduce disparities, would not require the technically complicated establishment of concordance between tariffs and would reduce the present tendency for tariffs to rise with the degree of processing.
>
> A second category is the reduction of rates by a percentage that would depend on the initial height of the tariff in the other participating countries. This technique raises the problem of determining which participants should be taken for reference purposes, and would require tariff concordances.
>
> A third approach is the reduction or elimination of differences between actual rates and lower "normative" or "target" rates. The target rates could vary from sector to sector, but the ultimate objective would always be to reduce tariffs. Different target rates could also be set for raw materials, semi-finished products and finished products.
>
> A fourth category could be harmonization rules providing for reduction of the average of duties in a given sector. A problem here is that of choosing the type of average to be used.[157]

Still another approach is the zero-tariff technique.[158] It would seem to be clear that during the Tokyo Round (which was intended by the Tokyo Declaration to be concluded by 1975[159]) either of the techniques described or a combination of them may be used in the negotiations. As far as the developing countries were concerned whatever the techniques adopted for negotiations, they suggested that provision should be made for their special needs. From the developing countries' perspective, since they have a particular interest in exporting their raw materials in a more processed form, the sectoral approach would be suitable for their purposes. This approach calls for all factors (tariffs and non-tariff) to be considered together within particular product groups, and thereby this process can enhance the degree of trade liberalization by improving prospects for a better international allocation of resources.

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[157] GATT ACTIVITIES IN 1973 op. cit. at pp. 22-23.

[158] Idem.

It must also be mentioned that until 1957 when Article XXVIII[160] was added, the General Agreement contained no specific provisions for general tariff negotiations. Again, this omission was as a result of the link to the prospective ITO.

A tariff "concession" or "binding" is a commitment by a contracting party to levy no more than a stated tariff on a particular item. These commitments were contained in a "Schedule". These Schedules were incorporated by reference into the General Agreement by operation of Article II (1) and (7).

Within this area, there is also the question of tariff classification.

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[159] _Ibid._, at p. 10.

[160] Dam GATT at pp. 433-439.

A way to escape commitments would be to divide a single classification into several sub-classifications and then argue that the commitment only applied to one of the sub-classifications. An example of this was found in the Swiss-German Treaty of 1904[161] whereby Germany conceded a tariff reduction to Switzerland on ". . . large dapple mountain cattle or brown cattle reared at a spot at least 300 metres above sea-level and which have at least one months grazing each year at a spot at least 800 metres above sea level."[162] Since there is no obligation in the General Agreement to follow any particular classification system, the Contracting Parties were free to adopt any form they wished provided there was no violation of any commitments made. Generally speaking the Brussels Tariff Nomenclature (BTN)[163] is used by most of the trading nations. Since an important trading nation like the United States has its own tariff classification system the process of negotiations is made even more difficult.

5. DEVELOPING COUNTRIES AND GATT

As mentioned previously the General Agreement was basically a product of Anglo-American post-Second World War thinking and was largely concerned with the trade of the developed world, little account being paid to the problems of the developing countries.[164] As early as 1946 at the London Session of the Preparatory Committee, the developing countries questioned the lack of provisions dealing with their problems.[165] The final structure of the international trade rules agreed upon favoured considerably the continued economic growth of the industrialized countries and inhibited the growth of the developing countries. In the words of the Cuban delegate at the 1947 Geneva Conference

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[161] 1968 I.L.C. YEARBOOK Vol. II at p. 170.

[162] Idem.

[163] Jackson WORLD TRADE at pp. 238-239.

[164] Gardner STERLING - DOLLAR at p. 356.

> *We are here . . . , who have dared to raise a voice before our elder brothers, and have come into the room where the big civilized Nations . . . are drafting the Charter of a new economic order. . . . We . . . think that if the London and New York drafts were to continue, we would be freezing the actual economic status of the different countries of the world. The agricultural countries would continue to be agricultural. The monoproducer countries would continue to be monoproductive, and the more developed countries would continue selling type-writers, radios, etc. to those nations that are still trying to produce the primitive tools.*[166]

The position of the developed countries at that time was most cogently described by Clair Wilcox "The undeveloped countries seek industrialization by some quick and easy route . . . , they hope to build new factories overnight. They do not believe that they must creep before they walk."[167]

In 1947 the maximum the developing countries[168] received was in the form of the compromise contained in Article XVIII.[169] This proved most unsatisfactory from the point of view of the developing countries and in September 1948 the amendments made to that article merely added more clauses.[170] This state of affairs lasted till the 1955 amendments[171] and the Working Party report explained these revisions of Article XVIII by observing that

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[165] Jackson WORLD TRADE at p. 628.

[166] U.N. Doc. E/PC/T/A/PV.22 at pp. 37 et seq.

[167] Wilcox TRADE CHARTER at p. 143.

[168] Dam GATT at p. 226.

[169] Jackson WORLD TRADE at p. 639.

> *. . . the new text represents a new and more positive approach to the problem of economic development and to the ways and means of reconciling the requirements of economic development with the obligations undertaken under the General Agreement regarding the conduct of commercial policy.*
>
> *The recognition of this general concept led the Working Party to the conclusion that a suitable solution could be found in an application to the special circumstances of economic development of the principle underlying Article XIX, i.e., that when a country is faced by a conflict between a vital domestic interest and the interests of its exporters as secured by the provisions of the General Agreement, it should, in the last resort, be possible for the government of that country, without infringing its obligations under the General Agreement, to take such action as it considers to be necessary, on the condition that any other contracting party affected by such action would also be free to take such measures as may be necessary to restore the balance of benefits. It is clear that such a condition has an important restraining influence since, before taking action, the government concerned would have to weigh carefully the advantages and disadvantages of unilateral action.*[172]

The piece-meal amendments of the General Agreement did not solve the dire problems of the developing countries and at their twelfth session in November 1957 the CONTRACTING PARTIES noted

> *. . . in particular the failure of the trade of less-developed countries to develop as rapidly as that of industrialized countries, excessive short-term fluctuations in prices of primary products and wide-spread resort to agricultural protection. . . .*[173]

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[170] Idem.

[171] Dam GATT at pp. 227-228.

[172] GATT BISD 3rd Supp. at p. 79.

[173] GATT BISD 6th Supp. at p. 15.

As a result GATT decided that an expert examination should be carried out of the past and current international trade trends. In the Haberler Report of October 1958 the Panel of Experts concluded that:

> *We think that there is substance in the feeling of disquiet among primary producing countries that the present rules and conventions about commercial policies are relatively unfavourable to them. While the under-developed primary producing countries have valid reasons for making a rather freer use of trade controls than the highly industrialized countries, in a number of cases protective policies have been carried too far by these countries; and these countries also have used for the protection of their industries a number of special weapons which are not normally the subject of negotiation with other countries. We have not examined in any detail these problems of protectionism in the non-industrial countries.*
>
> *Further progress depends upon the willingness of the industrial and the non-industrial countries to negotiate on a wide range of their economic and financial policies.*[174]

The CONTRACTING PARTIES reacted to this Report by initiating in 1958 an "action programme for trade expansion" and entrusted its responsibility to Committee III.[175]

At the twenty-first session of the CONTRACTING PARTIES in May 1963 the Ministers recognized "the need for an adequate legal and institutional framework to enable the Contracting Parties to discharge their responsibilities in connexion with the work of expanding the trade of less-developed countries."[176] This in turn resulted in the drafting in March 1964 of the chapter on Trade and Development for inclusion as an amendment to the General Agreement. At about the same time in 1964

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[174] GATT--TRENDS IN INTERNATIONAL TRADE (Haberler Report 1958), Sales No.: GATT/1958-3, at pp. 11-12 (1958).

[175] Dam. GATT at p. 229.

[176] GATT BISD 12th Supp. at p. 45.

UNCTAD I was held in Geneva (due to the impatience of the developing countries at their plight), which adopted various resolutions pertaining to the specific problems of the developing countries. In 1964 a Special Session of the CONTRACTING PARTIES completed drafting the Part on Trade and Development.[177] A Committee on Trade and Development was also established. There is little doubt that in consequence of this the developing countries "obtained a great deal of verbiage and very few precise commitments."[178] Also, nowhere in Part IV was there explicit provision for a departure from the MFN rule in the interest of the developing countries. A further important omission was with respect to agricultural products. The Trade and Development Committee devoted its efforts in attempts at the elimination and reduction of trade barriers affecting developing countries. The Committee also delegated some of its responsibilities to a special group--the Group on Residual Restrictions.[179] This Group had a list notified to it by the developing countries (265 items were on the list by 1965). Each year the Group summoned before it a developed country so that the Group might learn about all the restrictions maintained on the items on the list by the developed country, together with proposed abolition dates, if any, and the legal basis of such restrictions under the General Agreement. Progress here was very disappointing since, despite the fact that many of the restrictions were found to be illegal, developed countries refused to set abolition target dates.[180] In light of this, some developing countries had urged the introduction of a system, by amendment of the General Agreement, whereby developed countries would compensate developing countries for the remaining residual restrictions.[181] The

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[177] GATT BISD 13th Supp. at p. 2.

[178] Dam GATT at p. 237.

[179] Ibid., at p. 242.

> *. . . reigning view in less-developed countries was that economic development--which to those countries meant industrialization--required the creation of import substitution industries. It was asserted that such could flourish only behind high tariff walls supplemented, for both security and flexibibility, by quantitive restrictions, and even by out right embargoes on imports from developed countries.*[182]

5.1 Position of the Developing Countries

The essential question has always been, do the GATT rules in fact discriminate against the developing countries, i.e., do the rules operate differently on the trade of developing countries compared to the developed countries? On its face, it would seem (and this has been questioned by some) that the GATT rules apply equally to all contracting parties. Although for the most part the GATT rules apply to all types of trade equally, there are exceptions--for instance, a distinction is made between primary products and industrial products. As major primary producers this affects the trade of the developing countries considerably.

Another important question was whether there was an international obligation to abstain from discrimination in world trade, and whether there was also an obligation to conduct trade on a MFN basis? It was stated that the

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[180] Ibid., at p. 243.

[181] Idem.

[182] Ibid., at p. 226.

> *. . . term discrimination in international law . . . cannot be considered apart from the principle of equality, inasmuch as it invariably suggests unequal treatment. Trade discrimination in international law should be examined against the general background of the principle of equality of states to determine whether or not it sets up a compulsory standard of equality of treatment in commercial matters.*[183]

The Permanent Court of International Justice in the Advisory Opinion on the Minority Schools in Albania indicated that "Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations."[184]

It is maintained, however, that the principle of equality does not imply equal or identical rights but equal capacity or opportunity for the acquisition of rights.[185] It is within this context, it has been argued, that the MFN clause has usually been examined.

In dealing with the MFN obligation in GATT, an UNCTAD secretariat report concluded that

> *The traditional most-favoured-nation principle is designed to establish equality of treatment . . . but it . . . does not take account of the fact that there are in the world inequalities in economic structure and levels of development; to treat equally countries that are economically unequal constitutes equality of treatment only from a formal point of view but amounts actually to inequality of treatment.*[186]

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[183] K. Hyder (Hasan) EQUALITY OF TREATMENT AND TRADE DISCRIMINATION IN INTERNATIONAL LAW at p. 15 (1968).

[184] P.C.I.J. Advisory Opinions (1935) Series A/B, No. 64 at p. 19.

[185] K. Hyder op. cit. at p. 17.

[186] UNCTAD II--PROCEEDINGS Volume III, U.N.P. Sales No.: E.68.II.D. 15 (U.N. Doc. TD/97, vol.III).

Arnold Tammes, a member of the International Law Commission, correctly characterized this conclusion as being

> *. . . reminiscent of the Aristotelian definition of equality as requiring that the unequal should be treated unequally: "there will be the same equality between the shares as between the persons, since the ratio between the shares will be equal to the ratio between the persons; for if the persons are not equal, they will not have equal shares; it is when equals possess or are allotted unequal shares, or persons not equal, equal shares, that quarrels and complaints arise".*[187]

Further, from the perspective of international law it was held that it was necessary to know whether the MFN treatment was a compulsory standard of this law or merely an optional standard brought into operation by means of treaties. Georg Schwarzenberger was of the opinion that the MFN clause is an optional standard deriving its validity from the treaties in which they were incorporated.[188] It was also stated that the MFN clause "has not yet crystallised into a rule of international customary law",[189] and further, that there "is no general rule of international law which forbids discrimination in trade matters".[190] As against this, the International Law Commission in 1958 recognized that the rule of non-discrimination "is a general rule which follows from the equality of States";[191] and that non-discrimination is "a general rule inherent in the sovereign equality of States."[192] The

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[187] 1968 I.L.C. YEARBOOK Vol. I at p. 186.

[188] Schwarzenberger "The Province . . ." op. cit. at pp. 406-409.

[189] K. Hyder op. cit. at p. 33.

[190] Ibid., at p. 182.

[191] 1958 I.L.C. YEARBOOK Vol. III at p. 105.

[192] 1961 I.L.C. YEARBOOK Vol. II at p. 128.

United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States provides that ". . . States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality."[193] Further, the International Law Commission observed that

> *. . . the close relationship between the most-favoured-nation clause and the general principle of non-discrimination should not blur the differences between the two notions . . . while States are bound by the duty arising from the principle of non-discrimination, they are nevertheless free to grant special favours to other States on the ground of some special relationship of a goegraphic, economic, political or other nature. In other words, the principle of non-discrimination may be considered as a general rule which can always be invoked by any State. But a State cannot normally invoke the principle against another State which has extended particularly favourable treatment to a third State, provided that the State concerned had itself received the general non-discriminatory treatment on a par with other States.*[194]

Recently, the Charter of Economic Rights and Duties of States adopted by the United Nations General Assembly[195] at the urging of the Third World in fact makes no mention of the MFN treatment in the fundamental principles governing economic and other relations between States, and relegates it to a mere mention in Article 26 (under Chapter II--Economic rights and duties of States):

> *All States have the duty . . . to facilitate trade between States having different economic and social systems. International trade should be conducted without prejudice to generalized non-discriminatory*

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[193] G. A. Res. 2625 (XXV) 24 October 1970--65 Am. J. Int'l. L. 243 at 248.

[194] 1973 I.L.C. YEARBOOK Vol. II at p. 212.

[195] G. A. Res. 3281 (XXIX) 12 December 1974--69 Am. J. Int'l. L. 484.

> *and non-reciprocal preferences in favour of developing countries, on the basis of mutual advantage, equitable benefits and the exchange of most-favoured-nation treatment.*[196]

Taken in conjunction with the criticism that the "most fundamental weakness of the Charter is its overall failure to state clearly that the economic rights and duties of States are subject to international law"[197] it can even be aruged that the thrust of the new provisions of the Charter is to enhance the status of the Generalized System of Preferences (GSP) into a general principle making MFN treatment subject to it, that is as far as the developing countries are concerned.

6. GENERALIZED SYSTEM OF PREFERENCES

George C. Fisher maintains that

> . . . *the most-favoured nation principle actually discriminates against countries with less economic bargaining power and against a country whose producers cannot compete effectively with the most efficient producers at the given most-favoured-nation tariff rates. Drawing on these arguments, the developing countries claim the most-favoured-nation provision inhibits their efforts to compete effectively in world markets. They insist that preferential tariff treatment is necessary for them to develop foreign markets for their struggling manufacturing industries.*[198]

The need for a preferential system in favour of all developing countries was first recommended during UNCTAD I in 1964.[199] The

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[196] Ibid., at p. 492.

[197] Charles N. Brower and John B. Tepe Jr. "The Charter of Economic Rights and Duties of States: A Reflection" 9 International Lawyer at p. 302 (1975).

[198] G. C. Fisher "The most-favoured-nation clause in GATT" 19 Stanford Law Review at p. 843 (1966 - 67).

[199] General Principle Eight states that ". . . developed countries should grant concessions to all developing countries . . . and

[Continued on next page.]

position with respect to this was as follows :

> From General Principle Eight it is clear, that the basic philosophy of UNCTAD starts from the assumption that the trade needs of a developing economy are substantially different from those of a developed one. As a consequence, the two types of economies should not be subject to the same rules in their international trade relations. . . . The recognition of the trade and development needs of developing countries requires that for a certain period of time, the most-favoured-nation clause will not apply to certain types of international trade relations.[200]

Further, while

> . . . UNCTAD is in favour of a general non-reciprocal system of preferences from which all developing countries would benefit, it does not favour the so-called special or vertical preferences. Those refer to the preferential arrangements actually in force in some developing countries and some developed countries.[201]

Two types of preferential systems have been raised recently within GATT : as previously mentioned, by developed countries in favour of developing countries; and preferential arranagements amongst developing countries. As far as GATT was concerned initially the interests in preferences centred on the Australian waiver in favour of certain developing countries.[202]

[Continued from page 119.]
should not, in granting these or other concessions, require any concessions in return from the developing countries."-- UNCTAD I -- PROCEEDINGS Vol. I op. cit. at p. 20.

[200] 1970 I.L.C. YEARBOOK Vol. II at p. 237.

[201] The views of UNCTAD on the role of the most-favoured-nation clause in trade among developed countries and in trade among developing countries -- UNCTAD, Research memorandum No. 33/Rev. 1 at para. 23.

[202] The 1966 Australian waiver permitted the introduction of a system of preferences on imports from developing countries of specified

[Continued on next page.]

It should be mentioned that the United States was at the beginning hostile to any system of preferences but by the time of UNCTAD II in 1968 the United States had undergone a change of attitude.[203] There was unanimous agreement during UNCTAD II "in favour of the early establishment of a mutually acceptable system of generalized non-reciprocal and non-discriminatory preferences which would be beneficial to the developing countries."[204]

In June 1971 the CONTRACTING PARTIES approved the authorization for eighteen developed countries[205] to introduce GSP for products originating in developing countries. This authorization was obtained under Article XXV waiver for a period of ten years. However, this introduction of GSP was made subject to the statement accompanying the waiver. This in fact indicated that the undertaking by the developed countries did not constitute a binding commitment and that it was temporary in nature. Also, there was a condition attached that the arrangements was designed to facilitate trade from the developing countries and was not to

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[Continued from page 120.]
goods, which was made subject to certain conditions : Australian industry would not be severely injured by new imports; many items were subject to tariff quotas; and the waiver was open-ended in that Australia was permitted to vary the list of the goods, the rates of duty and the size of quotas -- Dam GATT at pp. 52 - 53.

[203] In fact in April 1967 at the Punta del Este Conference, the late President Johnson had announced the United States' willingness to "consider together possible systems of general non-reciprocal preferential treatment for exports of manufactures and semi-manufactures of the developing countries with a view to improving the condition of Latin American export trade." -- 56 Dept. of State Bulletin at p. 717 (1967).

[204] UNCTAD II -- PROCEEDINGS Vol. I, U.N.P. Sales No.: E.68.II.D.14.

[205] Austria, Belgium, Britain, Canada, Denmark, Finland, France, Western Germany, Ireland, Italy, Japan, Luxemburg, The Netherlands, New Zealand, Norway, Switzerland and the United States of America -- "Preferences for Developing Countries" 6 J.W.T.L. 712 (1972).

raise barriers to the trade of other countries.[206]

It is argued by Robert Hudec that for the first decade, from 1948 to 1958, the GATT code worked reasonably well, but since 1960 the "overall incidence of non-compliance has increased markedly to the point where a number of the GATT's rules have now been written off as simply inoperative."[207] Kenneth Dam criticizes the General Agreement as being dominated by a certain type of "legalism" :

> *. . . an approach to the drafting of international agreements under which draftsmen attempt to foresee all of the problems that may arise in a particular area (such as, let us say, the elimination of quantitive restrictions) and to write down highly detailed rules in order to eliminate to the greatest extent possible any disputes, or even any doubts, about the rights and obligations of each agreeing party under all future circumstances. . . .*
>
> *Law is not solely, or even primarily, a set of substantive rules. It is also a set of procedures, adapted to the subject matter and designed to resolve disputes that cannot be foreseen at the moment when those procedures are established. Perhaps more important than settling disputes, law viewed as procedures and processes serves to identify the common interest in complex situations and to formulate short term policies for the achievement of long-term objectives.*[208]

John Jackson most perceptively points out the difficulties inherent in the use of the Protocol of Provisional Application when he states

> *. . . the GATT, as applied through the Protocol of Provisional Application, has been amended a number of times and affected by other protocols and international*

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[206] Idem.

[207] Robert E. Hudec "GATT or GABB ? The Future Design of the General Agreement on Tariffs and Trade" 80 Yale Law Journal 1289 at p. 1304 (1971).

[208] Dam GATT at pp. 4-5.

> *agreements, including some not technically "in force". Thus the basic GATT treaty is a complex set of instruments applying with varying rigor to different countries. For the lawyers to ascertain at any given time the precise legal commitments between any two nations that are contracting parties to GATT is no easy task.*[209]

It is abundantly clear that at the beginning GATT was not conceived as an "organization", it was merely considered a makeshift contract with specific limited purposes. However, subsequent events and the later development of GATT, particularly by the continued improvement of its committee structure,[210] the creation of the Council of Representatives in 1960,[211] the establishment of the Secretariat, along with a Director-General (initially an Executive-Secretary)[212] went far beyond this limited scope, and in fact today for all intent and purposes GATT is a fully-fledged international organization.

UNCTAD's assessment of GATT was expressed as follows:

> *The remarkable expansion of world trade during the post-war era must be attributed, partly at least, to the efforts and activities initiated or sponsored by GATT. In contrast to the inter-war period of chaos, GATT introduced a new code of behaviour in world trade. Within the framework of its rules and consultative machinery, it has brought about considerable reductions in the tariffs and other restrictions on world trade : the latest and most-far reaching of which are those realized through the Kennedy Round.*
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> *It is true, however, that these reductions have been of benefit mainly to the industrial countries and that the developing countries generally have obtained very little direct benefit from this process. In most cases tariff negotiations tended to cover products of concern only to the industrial countries. Products of*

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[209] Jackson WORLD TRADE at p. 59.

[210] Dam GATT at pp. 336-337.

[211] Ibid., at p. 338.

[212] Jackson WORLD TRADE at pp. 148-149.

> *interest to the developing countries belonged , to a great extent, to the so-called "sensitive" products which were for the most part excluded from the scope of reductions. Moreover, tariff negotiations within the GATT framework were conducted on the basis of reciprocity of concessions. In other words, each country's offer of tariff reductions was conditional upon the receipt of roughly equal benefit from a reciprocal offer. As a consequence of the so-called "principal suppliers" who have substantial interest in the world trade of certain items and, as such are in a position to offer concessions. Since developing countries do not qualify as "principal suppliers" in most items they were relegated, perforce, to a position of secondary importance.*[213]

Despite the above criticisms, it should be emphasized that presently this so-called "temporary agreement" is still one of the principal regulating agencies for world trade. In light of this fact the developing countries have consistently advocated the substantial revision of the rules that are applicable to international trade. Recently, to this end in the "Declaration on the Establishment of a New International Order"[Appendix A] and the "Programme of Action on the Establishment of a New International Economic Order",[214] as well as, in the "Charter of Economic Rights and Duties of States"[Appendix B] the developing countries have in fact made substantive provisions so as to undermine the existing rules believed by them to be insufficiently biased in their favour.[215] Similarly, the creation by ECOSOC[216] of the forty-eight member United Nations Commission on Transnational Corporations in December 1974 reflects the United

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213 UNCTAD, Research memorandum, No. 33/Rev. 1 at paras. 11-12.

214 13 International Legal Materials 720 (1974).

215 Brewer and Tepe, Jr. op. cit. at pp. 309-316.

216 U.N. Doc. E/5655.

Nation's ongoing concern for the economic relationship between developed and developing countries.[217] The criticism by the developing countries is not restricted to the general rules applicable to international trade discussed above. They have also directed their attention to specific rules in areas such as import controls and export restrictions, as well as to the norms of substantive commercial law related to international transactions generally.

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[217] The report of the U.N. Commission on Transnational Corporations on its First Session (U.N. Doc. E/5655) states that the Commission "decided that among the various tasks it would undertake in the next few years the priority would be assigned to the formulation of the code of conduct. . . ." As for the code, "principles" relating to the conduct of transnational corporations, which may be acceptable to the "Group of 77" developing countries, were in January 1975 outlined by the Latin American and Caribbean nations at the meetings of the Third Preparatory Meeting of the Working Group on Transnational Enterprises of the Meeting of Foreign Ministers of the American Republics. Guidelines found in these "principles" bore "considerable similarity to the U.N. resolutions with respect to the New International Order and the Charter of Economic Rights and Duties of States" -- Seymour J. Rubin "Developments in the Law and Institutions of International Economic Relations -- Reflections Concerning the United Nations Commission on Transnational Corporations" 70 Am. J. Int'l. L. 73 at p. 88 (1976).

CHAPTER IV

IMPORT CONTROLS

1. *GENERAL*
2. *TARIFF COMMITMENTS*
3. *QUANTITIVE RESTRICTIONS*
4. *ANTI-DUMPING DUTIES AND COUNTERVAILING DUTIES*
    - 4.1 *1967 Anti-Dumping Code*
5. *ESCAPE CLAUSE RELIEF*
6. *ADJUSTMENT ASSISTANCE*

Overview

This chapter sets out the rules applicable to import transactions. The post-war international regulation of world trade has its genesis in what economists have termed--policies of "beggar-my-neighbour"--pursuit of which it was believed resulted in the virtual elimination of international trade. During this period, quantitive restrictions were viewed as anathema to the orderly expansion of international trade and the General Agreement in fact regarded them as the archcriminal of world trade, requiring in general terms their immediate eradication.

In dealing with import controls our focus is primarily directed at the General Agreement. The General Agreement was intended to contain precisely formulated legal rules, sometimes termed 'contractual', which were to be directly applied. But the General Agreement also contained various exceptions to these specific rules, as well as escape clauses. The suitability of some of these legal rules of trade conduct, as well as the question of its effective enforcement by GATT, is a matter of prime importance for the developing countries. The most immediate question for these countries at present is the treatment accorded to them under these rules and whether some accommodation can be achieved which would allow them to depart from its strict compliance.

It should be remembered that the General Agreement makes a clear distinction between tariffs and other forms of trade barriers. Tariff concessions were normally to be made at international trade conferences called for that purpose under the principle of reciprocity. These tariff concessions then were to be extended to other Contracting Parties by means of the MFN clause. Non-tariff barriers, according to the General Agreement, as matter of principle, were to be immediately abolished. However this never materialized and trade negotiations (under the Kennedy Round and presently under the Tokyo Round) also concerned non-tariff barriers.

The General Agreement sets out in some detail the rules applicable to import transactions, prohibiting certain measures and regulating others. The substantive obligations under the General Agreement as far as they apply to imports may be divided into: tariff commitments; MFN treatment; and certain obligations pertaining to non-tariff barriers. Thus, quantitive restrictions as mentioned previously are generally prohibited, subject to specified exceptions. Other measures, such as those dealing with marks of origin, have special rules. Anti-dumping duties and countervailing duties affecting imports may only apply in accordance with specified rules.

The General Agreement is replete with provisions that were incorporated as a result of American domestic activities. One such action relates to tariff adjustment (escape clause relief). Petitions from producers against increased imports, which have made their products non-competitive not only in world markets but also in the domestic market as well, have also led to the use of adjustment assistance. Rather than subsidizing such domestic industries, adjustment assistance in the form of relocation of workers after retraining programmes or the development by domestic firms of different lines of production have been advocated specifically by some for the United States as a policy alternative.

It should be pointed out that the "escape clause" safeguard system found in the General Agreement has been used to a very limited extent in the past and instead there has been widespread use of the so-called "voluntary restraints" programme which have brought about frictions in international trade relations. The developing countries attach great importance to the reformulation of the existing safeguard rules. They propose that differentiated and more favourable treatment should be granted to them and that, as a general rule, safeguard measures should not be applied by developed nations to the imports from developing countries. They believe the only exception would be in the case of proven actual material injury to domestic production in the developed countries, but any action taken in such a case must consider the injury that might be caused to export industries in the developing countries.

1. GENERAL

The Preamble to the General Agreement envisages "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade."[1] To achieve the objects sought, certain fundamental principles were incorporated into the General Agreement.

It is clear from the foregoing that tariffs and non-tariff barriers affecting imports were important targets for specific treatment. The General Agreement makes a distinction between tariffs and other forms of trade barriers. As mentioned previously tariff concessions were normally to be made at tariff conferences under the principle of reciprocity. These were then to be extended to other Contracting Parties by means of the MFN clause. Non-tariff barriers, according to the General Agreement, as a matter of principle, were to be immediately abloished. Trade negotiations under the Kennedy Round dealt with non-tariff barriers. But as

> *. . . might have been expected, those negotiations were not outstandingly successful. Contracting parties following practices inconsistent with the General Agreement sought concessions from other contracting parties as reciprocity for the abolition of those practices, whereas contracting parties adhering to the General Agreement argued that the principle of immediate abolition took precedence over the principle of reciprocity.*[2]

Non-tariff barriers can assume widely differing forms. The General Agreement prohibits certain measures, while regulating others only. Thus, quantitive import restrictions are prohibited (subject to specified exceptions) under Article XI, just as measures touching domestic legislation and regulations discriminating against imported products are similarly prohibited under Article III. On the other hand, financial measures dealing with internal taxes (under Article III), fees charged by customs officials (under Article VIII), etc. are regulated, just as non-financial measures like the prompt publication of laws, regulations and judicial decisions (under Article X) are also regulated.

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[1] 55 U.N.T.S. 194.
Also, see Dam GATT at p. 391.

[2] Dam GATT at p. 19.

Other measures, such as those applicable to marks of origin (under Article IX) have special rules, while production subsidies that tend to reduce imports (under Article XVI) merely require the obligation of notification and consultation to reduce subsidization. As for state trading agencies, market considerations and national treatment were to be applied in making purchases (under Articles XVII; II (4) and III (4)). Anti-dumping duties and countervailing duties affecting imports are to be applied only in accordance with Article VI.

It is clear that the drafters of the General Agreement intended to outline a number of provisions dealing with imports and how they were to be applied by the Contracting Parties. It is not our intention to examine all of these provisions.

The substantive obligations under the General Agreement as far as they apply to imports may be divided into: tariff commitments; MFN treatment; and certain obligations pertaining to non-tariff barriers.

2. TARIFF COMMITMENTS

As previously indicated one of the important obligations of the General Agreement was the tariff concession--a commitment by a Contracting Party to levy no more than a stated tariff on the importation of a particular product. This commitment was contained in a Schedule for that Contracting Party and was incorporated by reference into the

General Agreement through the provisions of Article II (1) and (7). Article II (1) in fact provides that each Contracting Party "shall accord to the commerce of the other Contracting Parties' treatment no less favourable than provided for in the appropriate Part of the appropriate Schedule." Further, the importation of products described in Part I of the Schedule to a country from another Contracting Party "shall . . . subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary custom duties in excess of those set forth and provided for therein." Also, imports entitled under Article I to preferential treatment described in Part II of the Schedule shall receive certain specific exemptions under Article II (1) not only relating to ordinary custom duties but also from all other duties or charges of any kind imposed.[3] In addition Article II (3) prevents a Contracting Party from altering "its method of determining dutiable value or of converting currencies so as to impair the value of the concessions"[4] granted; while Article II (5) deals with commitment concerning product classification under a Contracting Party's tariff laws and consultations for compensatory adjustment;[5] Article II (6) concerns a commitment against currency revaluation to effectively change tariff rates.[6] Thus, the specific legal obligations that

> . . . *attach to a GATT Schedule "concession" can be summarized as follows:*

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[3] Jackson WORLD TRADE at p. 209.

[4] Ibid., at p. 492.

[5] Ibid., at p. 212.

[6] Ibid., at p. 492.

(1) *The tariff maximum or ceiling expressed as the "bound" duty rate in the Schedule, as applied by Article II, paragraph 1;*

(2) *other provisions of Article II that are designed to protect the value of the concession from encroachment by other governmental measures such as "other charges", new methods of valuing goods, reclassification of goods, and currency revaluations;*

(3) *limits on the protection that can be afforded by use of an import monopoly (Article II, paragraph 4);*

(4) *a GATT interpretation that new subsidies*[7] *granted on products covered in a nation's Schedule are in effect a* ***prima facie*** *"nullification" for purposes of Article XXIII.*[8]

The provisions of Article II do not cover anti-dumping and countervailing duties, charges equivalent to an internal tax imposed on the like domestic product and charges for services (Article II (2)[9]).

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[7] Subsidies can provide protection to domestic producers from exports of foreign goods by enabling the domestic producer to sell in the local market at a price below that applicable to the imported goods (because of the level of subsidy). In this way foreign goods can be prevented from being purchased.

[8] Jackson WORLD TRADE at p. 205.

[9] Article II (2) provides:
Nothing in this Article shall prevent any Contracting Party from imposing at any time on the importation of any product
(a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;
(b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI;
(c) fees or other charges commensurate with the cost of services rendered.
--Dam GATT at p. 394.

The GATT Schedules have resulted in a number of technical legal problems, particularly those concerning classification of items, as well as rates and the duration of Schedules. The original Article XXVIII provided in fact that after January 1951 any Contracting Party could renegotiate or withdraw any concessions. This was extended on a number of occasions until the 1955 amendment to Article XXVIII, whereby the concessions granted are given an indefinite application with a renegotiation privilege every three years.[10]

As mentioned previously the General Agreement was predicated upon the future establishment of the International Trade Organization, therefore, "nothing in the original GATT itself set forth a legal framework for new tariff negotiations. The General Agreement was conceived as a product of the negotiations, not a framework for conducting them."[11] Until 1955 the General Agreement contained no legal obligations to enter into negotiations, and the addition of Article XXVIII bis in 1955 merely provided for the CONTRACTING PARTIES to sponsor such negotiations and that the success of multilateral negotiations depended on the participation of all Contracting Parties.[12] The General Agreement envisages major negotiations of all Contracting Parties periodically under Article XXVIII bis, as well as negotiations between the CONTRACTING PARTIES and a new party acceding to the General Agreement under Article XXXIII.[13] In addition, Article XXVIII provides for three year renegotiations (Article XXVIII (1)); special circumstance renegotiations (Article XXVIII (4)); reserved renegotiations (Article XXVIII (5)); compensatory renegotiations on the creation of a customs union or free-trade area (Article XXIV (4)[14]); development renegotiations (Article XVIII (7)[15]); withdrawal under Article XXVII[16] and rectifications.[17]

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[10] Jackson WORLD TRADE at pp. 216-217.

[11] Ibid., at pp. 220-221.

[12] Dam GATT at pp. 57-58.

[13] Jackson WORLD TRADE at pp. 92-96.

Subject to the existing legislation provision of the Protocol of Provisional Application, the Contracting Parties may not apply internal taxes and other internal charges (affecting purchase, sale, transport or distribution) to foreign products so as to protect domestic production (Article III (1)[18]). Goods imported from other countries shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind which are higher than those applied like domestic products (Article III (2)[19]). Regulations also have to be applied in a similar fashion (Article III (4), (5) and (7)[20]). Stipulations regarding the compulsory use of certain domestic products in a manufacturing process are prohibited (Article III (5)), but this does not apply to regulations in force on July 1, 1939, April 10, 1947 and March 24, 1948 (at the option of a Contracting Party) provided that any such regulation contrary to Article III (5) shall not be modified to the detriment of imports and must be treated as a customs duty for the purpose of negotiation (Article III (6)[21]). Under Article IV[22] quota arrangements for cinematographic films are permitted under certain conditions. Article VII contains provision dealing with valuation for customs purposes which should be based on the actual value of the imported merchandise or of the like merchandise and that the actual value should be in the ordinary course of trade under fully competitive conditions.[23] The provisions regarding marks of origin under Article IX require Contracting Parties not only to accord MFN treatment but also, as a general rule, not to impose special duties or penalties for non-compliance.[24] Article X contains provisions concerning the publications of laws, regulations, judicial decisions pertaining to the classification or the valuation of products for customs purposes promptly.[25] It should be pointed out that the foregoing is subject to the provision relating to existing legislation.

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[14] Dam GATT at pp. 275-295.

[15] Jackson WORLD TRADE at pp. 235-236.

[16] Ibid., at p. 230.

[17] Dam GATT at pp. 34-35.

[18] Jackson WORLD TRADE at pp. 279-286.

[19] Ibid., at pp. 281-282.

[20] Ibid., at pp. 286-294.

3. QUANTITIVE RESTRICTIONS

The archcriminal of international trade, to many, has been quantitive restrictions, and has even been viewed "as the incarnation of international commercial evil."[26] Clair Wilcox described the case against "quotas" in this way:

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[21] Dam GATT at p. 397.

[22] Jackson WORLD TRADE at pp. 293-294.

[23] Ibid., at pp. 446-454.

[24] Ibid., at pp. 459-461.

[25] Ibid., at pp. 461-464.

[26] Dam GATT at p. 148.

> *Quantitive restrictions . . . impose rigid limits on the volume of trade. They insulate domestic prices and production against the changing requirements of the world economy. They freeze trade into established channels. They are likely to be discriminatory in purpose and effect. They give the guidance of trade to public officials; they cannot be divorced from politics. They require public allocation of imports and exports among private traders and necessitate increasing regulation of domestic business. Quantitive restriction are among the most effective methods that have been devised for the purpose of restricting trade. They make for bilateralism, discrimination, and the regimentation of private enterprise.*[27]

John Jackson describes a "quota is a government decree that in any given period (usually a year) only a specified amount (or value) of a certain product can be imported."[28] Quotas are usually administered by means of licenses.

Quotas were extensively used in the early 1930's and as previously mentioned led to the general breakdown of international trade. The immediate post-World War II policy goal of the United States was the elimination of the use of quotas. Quantitive restrictions were seen to have three undesirable characteristics: quotas allowed the domestic market to be cut off from the discipline of the world market; quantitive restrictions, since they were usually imposed by the executive branch without legislative intervention, could be applied in a hidden discriminatory fashion; and quantitive restrictions, as they were determined by administrative officials, could be easily adjusted. The United States' view was repudiated by those countries that had balance of payments problems and also by those countries that sought industrialization, as well as those that protected domestic agriculture. The Indian delegate represented the position of the developing countries looking to rapid industrialization, when he said

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[27] Wilcox TRADE CHARTER at pp. 81-82.

[28] Jackson WORLD TRADE at p. 305.

> *Our approach to this problem is very different, and . . . on many points the disagreement between our experts and the American experts is fundamental. . . . The kind of co-operation to which India attaches importance is a relationship based on respect for the principle of equal rights and self-determination of peoples.*
>
> *From every point of view, we consider that it is essential that the nation's economic development should not be left wholly to the operations of private enterprise and unchecked competition, whether internal or external, as seems to be implied by some of these proposals. . . .*
>
> *[O]ur plans are of an expansionist character . . . but it will only expand if we take a rational view of the whole problem of trade regulation, and instead of rejecting certain methods of regulation on grounds which are not applicable to Indian conditions, make full and effective use of them for the purpose of building up our economy.*[29]

The eventual outcome was the four articles found in the General Agreement and was referred to as the "London Compromise".[30] The developing countries were not pleased with this at all. The central obligations concerning quantitive restrictions are found in Articles XI to XIV. They "establish a scheme of control that can be outlined as follows:

> *XI: Prohibition on the use of quotas (with certain exceptions);*
>
> *XII: Exception to XI for balance-of-payments reasons;*
>
> *XIII: In case exceptions are utilized and quotas applied, they must be applied "nondiscriminatorily", i.e.,*

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[29] Ibid., at p. 311.

[30] William Brown THE UNITED STATES AND THE RESTORATION OF WORLD TRADE at p. 67 (1950).

> *similar to a Most-Favored-Nation basis, and in accordance with certain other rules;*
>
> *XIV: Exception to XIII in certain balance-of-payments cases.*
>
> *In addition, Article XV sets forth a relationship between the GATT and the International Monetary Fund that intimately affects the balance-of-payments exceptions while Section B of Article XVIII sets forth some special balance-of-payments exceptions for developing countries.*[31]

The basic obligation is a flat prohibition found in Article XI (1) which states:

> *No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any Contracting Party on the importation of any product of the territory of any other Contracting Party or on the exportation or sale for export of any product destined for the territory of any other Contracting Party.*[32]

The Interpretive Notes provide that "the terms 'import restrictions' or 'export restrictions' include restrictions made effective through state-trading operations."[33]

In Article XI (2) there are the following exceptions: (a) export restrictions to relieve food shortages; (b) restrictions necessary to the application of standards for grading or classifications; (c) import restrictions on any agricultural or fishery product under certain circumstances. Gerard Curzon explained the agricultural and fishery exception in the following way:

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31 Jackson WORLD TRADE at p. 308.

32 Dam GATT at p. 407.

33 Ibid., at p. 456.

> *[A]griculture and fisheries [are characterized by] a multitude of small and unorganized producers . . . faced suddenly with very large crops or catches, and the governments accordingly had to step in and organize them . . . [whereas] . . . [i] ndustrial producers [do] not suffer from the same disadvantages and [are] usually sufficiently well organized.*[34]

It is clear that this exception was a reflection of the then existing United States legislation.[35] This exception for agricultural products particularly infuriated the developing countries and the primary product producing countries, who were prevented from protecting their infant industries, while the developed nations were permitted to protect domestic agricultural producers from the very type of imports that the developing countries were likely to produce.[36] This was looked upon as discrimination against the products of the developing countries.[37]

The application of the above exception has been explained by the United States Department of State as follows:

> *First, imports may not be restricted unless the domestic product is also restricted. This rule is necessary to prevent the use of quotas for ordinary protective purposes. Secondly, the domestic product must be restricted to approximately the same degree as the imported product. This requirement, which is related to the first, is necessary to prevent countries from applying their restrictions in such a way as to boost domestic output by cutting down on imports. Finally, advance public notice must be given of the amount of imports to be let in, and the member applying the restrictions must consult*

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[34] Gerard Curzon op. cit. at p. 131.

[35] William Brown op. cit. at pp. 22-28.

[36] U.N. Doc. E/PC/T/A/PV.22 at p. 23 (1947).

[37] U.N. Doc. E/Conf.2/23 at pp. 32 and 36 (1947).

> *with any other member who complains that the restriction does not meet the requirements referred to above.*[38]

As far as the balance of payments exception under Article XII is concerned, two types are envisaged: import restrictions may be imposed "to forestall the imminent threat of, or to stop, a serious decline" in monetary reserves; or "in the case of a Contracting Party with very low monetary reserves, to achieve a reasonable rate of increase in its reserves." Restrictions imposed shall be progressively relaxed as conditions improve. The balance of payments exception found in Article XVIII (9)[39] applicable to economic development assistance programmes is subject to less strict procedural safeguards.

Article XIII[40] "is basically an attempt to apply a Most-Favoured-Nation obligation to quotas."[41] This article contains three types of obligations: "a Most-Favored-Nation type of obligation; certain detailed rules for the manner in which quantitive restrictions are applied, designed to achieve an equitable distribution of import permissions among various contracting parties; and a series of obligations requiring notification and consultation."[42] John Jackson summarizes this by stating that

> *Article XIII imposes a "nondiscrimination" obligation upon the use of quotas when quotas are used. To get*

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[38] The Geneva Charter for an International Trade Organization, Dept. of State Pub. No. 2950 at p. 6 (1947).

[39] Jackson WORLD TRADE at pp. 687-691.

[40] Dam GATT at pp. 411-413.

[41] Jackson WORLD TRADE at p. 321.

[42] Ibid., at p. 322.

> *around the problem of the inherent discrimination of most quotas, an attempt has been made in Article XIII to specify rules for their use. These rules state a preference for "global" quotas, but fall back on the "representative period" concept for allocating quotas when global quotas are unworkable. The important question, still not resolved satisfactorily, is how to allocate fairly by reference to a "representative period" and to "special factors".*[43]

It should be pointed out that, although the balance of payments difficulties was allowed as an exception to quantitive restrictions, the General Agreement did not permit the raising of tariffs--tariff surcharges--to overcome balance of payments crisis. Article XIV[44] authorizes deviations from the non-discrimination rule of Article XIII.

A great deal of the first fifteen years of "the history of GATT centers on the effort to get quota systems of protection dismantled. Indeed, its efforts in this respect has been billed as one of the more significant contributions of GATT to the postwar economic world."[45] There have been some moves toward negotiating quantitive restrictions, with explicit references in the Dillon Round rules of procedure,[46] as well as the provision in the Kennedy Rounds for negotiations on non-tariff barriers.[47] The Tokyo Declaration of September 1973 calls for negotiations to "reduce or eliminate non-tariff measures or, where this is not appropriate, to reduce or eliminate their trade restricting of distorting effects, and to bring such measures under more effective international discipline."[48]

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[43] Ibid., at p. 327.

[44] Ibid., at p. 681.

[45] Ibid., at p. 307.

[46] GATT BISD 8th Supp. at p. 116 (1960).

[47] John Evans U.S. TRADE POLICY at pp. 64-71 (1967).

4. ANTI-DUMPING AND COUNTERVAILING DUTIES

Anti-dumping and countervailing duties are dealt with together in Article VI.[49] This article describes dumping by which products of one country are introduced into the commerce of another country at less than the normal value of the products and condemns it if it causes or threatens material injury to an established industry or materially retards the establishment of a domestic industry. It also lays down that

> *. . . a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another*
>
> *(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or*
>
> *(b) in the absence of such domestic price, is less than*
>
> *(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or*
>
> *(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.*[50]

Anti-dumping duties have been called "a curious hybrid of tariff ideas and price discrimination theories of antitrust law."[51] The provisions relating to anti-dumping duties and countervailing duties were initially found in Article 11 of the United States' Suggested Charter.[52] The discussions at time "had shown that there were four types of dumping: price, service, exchange and social. Article 11 permitted measures to counteract the first type. It would obligate members not to impose anti-dumping duties with respect to the other three types."[53] "Service" dumping applied specifically to "freight" dumping, by which exporters using subsidies to enable them to charge minimal freight rates permitted them a price advantage in foreign markets. "Exchange" dumping concerned the manipulation of exchange rates to gain competitive advantage for exports. "Social" dumping applied to the use of prison or sweated labour in the production of goods which meant that these products could be sold at a cheap price.

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[48] GATT ACTIVITIES IN 1974, Sales No. 1975/2 at p. 17 (1975).

[49] Dam GATT at pp. 167-179.

[50] Ibid., at p. 400.

[51] Notes and Comments "The Antidumping Act--Tariff or Antitrust Law?" 74 Yale L.J. 707 (1964-65).

It should be mentioned that the United States' proposal went even beyond her domestic legislation. The Antidumping Act, 1921[54] and the Tariff Act, 1930[55] dealt with anti-dumping and countervailing duties that applied in the United States. The latter enactment did not require injury to domestic industry before countervailing duties could be applied.[56]

The provisions in the General Agreement contemplate retaliation only when products are sold in another country at less than the price in the domestic market and this causes or threatens material injury in the importing market (Article VI (1) and (6)). Since there is the danger that anti-dumping duties can be abused the CONTRACTING PARTIES during their thirteenth session in 1958 appointed a group of experts to study the problem. The Group of Experts in their two reports presented in 1959 and 1960 agreed

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[52] U.S. "Suggested Charter for an International Trade Organization", Dept. of State Pub. No. 2598--article 11--at p. 5 (1946).

[53] U.N. Doc. E/PC/T/C.II/48 at p. 1 (1946).

[54] 42 U.S. Stat. 11 (1921) as amended by 19 U.S.C. §160 (1958).

[55] 46 U.S. Stat 687 (1930) as amended by 19 U.S.C. §1303 (1964).

[56] Jackson WORLD TRADE at p. 404.

> *. . . that it was essential that countries should avoid immoderate use of anti-dumping and countervailing duties, since this would reduce the value of the efforts that had been made since the war to remove barriers to trade. These duties were to be regarded as exceptional and temporary measures to deal with specific cases of injurious dumping and subsidization.*[57]

In 1963-1964 a study was undertaken by the GATT "Committee on the Legal and Institutional Framework of GATT in Relation to Less-Developed Countries" (as part of its work which eventually led to the drafting of Part IV to the General Agreement) on "measures to offset subsidies granted by less-developed countries."[58] During the Kennedy Round the "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade"[59] (generally referred to as the 1967 Anti-dumping Code) outlined certain definitions of terms used in Article VI and laid down the standards for the procedures that countries had to utilize to apply anti-dumping duties. The Anti-dumping Code only applies to those nations that accept it[60] and it is not meant to be an amendment of the

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[57] GATT BISD 8th Supp. at p. 145 (1960).

[58] GATT Doc. L/2097, Add. 1, 2 (1964).

[59] 6 I.L.M. 920 (1967).

[60] John Barcello "Antidumping Laws as Barriers to Trade--The United States and the International Dumping Code" 57 Cornell Law Review 491 at p. 533 (1972).

General Agreement.[61]

Article VI (3) provides

> *No countervailing duty shall be levied on any product of the territory of any Contracting Party imported into the territory of another Contracting Party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise.*[62]

But as indicated previously retaliation is only permitted in accordance with Article VI (6). It provides:

> *(a) No Contracting Party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another Contracting Party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.*[63]

Further, Article VI (4) provides:

> *No product of the territory of any Contracting Party imported into the territory of any other Contracting Party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.*[64]

While Article VI (5) states that products cannot "be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization."[65]

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[61] Dam GATT at pp. 174-175.

[62] Ibid., at p. 400.

[63] Ibid., at p. 401.

[64] Idem.

The foregoing clearly shows that it is essential to remember that certain expressions used in the provisions have caused some difficulty in deciding when retaliatory measures are permitted under the General Agreement. Thus, expressions such as "like product" (which occurs frequently in the General Agreement), "normal value", "comparable price", "export price" etc. have been subjected to some careful scrutiny. The Group of Experts in their 1959 and 1960 Reports entitled Antidumping and Countervailing Duties in fact made a suggestion that "like product" should be "interpreted as a product which is identical in physical characteristics subject, however, to such variations in the presentation which are due to the need to adapt the product of special conditions in the market of the importing country. . . ."[66] The 1967 Anti-Dumping Code on the other hand for the purposes of the Code interprets "like product" to mean "a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."[67] The Antidumping and Countervailing Duties Report holds that "export price" is the price at which the like product left the exporting country and not the price at which it entered the importing country. The Report suggests that it would be ideal to base it on the

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[65] Idem.

[66] GATT Report of Group of Experts ANTIDUMPING AND COUNTERVAILING DUTIES, Sales No. GATT/1961-2, at p. 11 (1961).

[67] Jackson WORLD TRADE at p. 427 (Anti-Dumping Code Article 2(b)).

"ex factory price" on sales for export, but "f.o.b.--port of shipment price" would also be satisfactory.[68] The 1967 Anti-Dumping Code indicates that to carry out a fair comparison between the export price and the domestic price in the exporting country, the two prices must be compared at the same level of trade, normally at the ex factory level.[69] The Interpretive Note to Article VI, paragraph 1 states

> *Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.*[70]

The 1967 Anti-Dumping Code holds that where there is no export price or it is unreliable because of association arrangements between the exporter and importer, the export price can be constructed on the basis of the price at which the imported product is first resold to an independent buyer.[71] On the other hand, the Antidumping and Countervailing Duties Report maintains that simply selling imported products at a loss to gain a foothold in the market is not "dumping in the GATT sense."[72]

Another problem concerns the exemption or refund of duties or taxes borne by like product when exported under Article VI (4) since this provision has been interpreted to apply only to taxes on products, i.e., sales tax, turnover tax, etc. and excludes income tax. This is related to the question of border tax adjustments as well.

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[68] GATT ANTIDUMPING . . . op. cit. at p. 8.

[69] Jackson WORD TRADE at p. 428 (Anti-Dumping Code article 2(f)).

[70] Dam GATT at p. 454.

[71] Jackson WORLD TRADE at p. 424 (Anti-Dumping Code article 2(e)).

[72] GATT ANTIDUMPING . . . op. cit. at p. 11.

A further question relates to "indirect dumping" where the products made in country X are first shipped to country Y and then from country Y to country Z where country Z complains of dumping. The Antidumping and Countervailing Duties Report casts doubt as to whether the General Agreement allows offsetting measures.[73]

The Interpretive Note to Article VI, paragraphs 2 and 3 states that multiple currency practices can in certain circumstances constitute a subsidy or a form of dumping permitting counter-measures.[74]

The Antidumping and Countervailing Duties Report states that "no precise definition or set of rules could be given in respect of the injury concept", but suggests that a common standard ought to be adopted.[75] The 1967 Anti-Dumping Code holds that dumping must be demonstrably the principal cause of material injury or threat of material injury and that this must be weighed with all other factors taken together that may be adversely affecting the industry.[76] In connection with this problem of injury is also the problem of what amounts to an "industry". The Antidumping and Countervailing Duties Report states that a single firm within a large industry is not covered generally and counter-measures in such a case in their opinion would be "protectionist in character, and the property remedy for that firm lay in other directions"[77] The 1967

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[73] Ibid., at p. 12.

[74] Dam GATT at pp. 454-455.

[75] GATT ANTIDUMPING . . . op. cit. at p. 10.

[76] Jackson WORLD TRADE at p. 428 (Anti-Dumping Code article 3).

[77] GATT ANTIDUMPING . . . op. cit. at p. 10.

Anti-Dumping Code gives a definition of industry and refers "to the domestic producers as a whole of the like product or to those of them whose collective output of products constitutes a major portion of the total domestic production of those products" with exceptions for the case where one of the producers is also an importer of the dumped products and others.[78] As for the situation of retarding the establishment of domestic industries, the 1967 Anti-Dumping Code demands "convincing evidence of the forthcoming establishment of an industry must be shown, for example, that the plans for a new industry have reached a fairly advanced stage, a factory is being constructed or machinery has been ordered."[79]

Article VI (6) (b) and (c) deal with the situation where dumping in one country actually causes harm to another country.[80] This contemplates the case where country X dumps goods in the market of country Y, and country Z is a traditional supplier of like products to the market of country Y. The goods dumped by country X does not cause injury to country Y, but does injury to country Z, the traditional supplier. In such a situation the General Agreement permits country Y to take countermeasures to protect the interests of its trading partner.

Article VI (7) presumes that material injury does not result where a system of stabilization of domestic prices of primary products is undertaken.[81]

It should be stressed that the provisions found in Article VI dealing with anti-dumping and countervailing duties are also subject to "existing legislation" provision of the Protocol of Provisional Application. It is because of this that the United States legislation that applied to countervailing duties not requiring any determination or finding of "injury"[82] continued to govern her international trade and was for a long time a contentious issue with her trading partners.

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[78] Jackson WORLD TRADE at p. 430 (Anti-Dumping Code article 4).

[79] Ibid., at pp. 428-429 (Anti-Dumping Code article 3(a)).

[80] Dam GATT at p. 401.

[81] Dam GATT at pp. 401-402.

4.1 1967 Anti-Dumping Code

As mentioned previously the Kennedy Round made some attempt at dealing with non-tariff barriers. One of its successes was the Anti-Dumping Code. In order to understand the background to the Code, it is necessary to recount the position obtaining at the level of domestic legislation in various countries at that time. Besides the United States, Canada's anti-dumping legislation[83] (which also did not require a finding of injury) was the next most comprehensive--the United States products imported into Canada was subject to most of the anti-dumping duties; while Britain during the 1960s had undertaken a considerable programme of anti-dumping actions and the European Common Market was commencing to draft its own anti-dumping regulations. The United States felt that an Anti-Dumping Code would be a means of warding off contemplated actions and a method to protect American exports from discriminatory application of anti-dumping duties in the future. The Anti-Dumping Code contained a number of highly detailed provisions, arrived at by compromises in trade negotiations rather than an attempt to remedy any defects in

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[82] John Barcello op. cit. at pp. 518-524.

[83] An Act to Amend the Customs Tariff of 1897, S.C. 1904, c. 11.

Article VI. The Code also does away with the "existing legislation" provision as a condition of its acceptance.[84] Further, the Code specifically states in the preamble that the parties to the agreement are desirous of interpreting the provisions of Article VI.[85]

The developing countries as previously mentioned have not accepted the Anti-Dumping Code "because of the special characteristics of their economies, and their balance-of-payment difficulties, they believe that their domestic prices are not directly comparable with those obtainable in international markets and cannot therefore serve as a reliable indication of whether their exports are being sold at dumped prices."[86] In order to overcome this problem, GATT has set up a Working Group to look into this matter.

5. ESCAPE CLAUSE RELIEF

The General Agreement is replete with provisions that were incorporated as a result of American domestic activities. One such action relates to tariff adjustments (escape clause relief). The inter-war United States commercial policy was evolved with the understanding that it was intended to assist, not injure American industry and agriculture, and hence the interests of domestic industries which might face serious import competition would be taken into account. Accordingly, an "escape clause" was usually inserted in trade agreements signed by the United States. This policy consideration, largely due to the action of the

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[84] Jackson WORLD TRADE at p. 438 (Anti-Dumping Code article 14).

[85] Ibid., at p. 426.

[86] GATT ACTIVITIES in 1974 op. cit. at p. 39.

Senate, even led to President Truman issuing an Executive Order requiring that an "escape clause" be inserted in all future trade agreements.[87]

At the London Session of the Preparatory Committee in 1946 the purpose of the escape clause was explained by the United States delegate as being

> . . . *to give more flexibility to the commitments undertaken in Chapter IV. Some provision of this kind seems necessary in order that countries will not find themselves in such a rigid position that they could not deal with situations of an emergency character. Therefore, the Article would provide for a modification of commitments to meet such temporary situation. In order to safeguard the right given and in order to prevent abuse of it, the Article would provide that before any action is taken under an exception, the member concerned would have to notify the organization and consult with them, and with any other interested members.*[88]

Article XIX (1) contains the escape clause relief and provides.

> (a) *If, as a result of unforeseen developments and of the effect of the obligations incurred by a Contracting Party under this Agreement, including tariff concessions, any product is being imported into the territory of that Contracting Party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the Contracting Party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury to suspend the obligation in whole or in part or to withdraw or modify the concession.*[89]

From the foregoing it is clear that a party seeking to invoke escape clause relief, will have to show:

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[87] Stanley D. Metzger "The Escape Clause and Adjustment Assistance: Proposals and Assessments" 2 Law and Policy in International Business 352 at p. 357 (1970).

[88] U.N. Doc. E/PC/T.C.II/PV 7 at p. 3 (1946).

[89] Dam GATT at p. 426.

(1) imports in such increased quantities

(2) as a result of (a) unforeseen developments and (b) effect of General Agreement obligations

(3) which causes serious injury or threatens series injury.

Further, Article XIX (1) (b) outlines the situation concerning preference concessions.[90]

As for "increased quantities" absolute increase is not necessary as the Working Party report adopted by the CONTRACTING PARTIES at the Second Session in 1948 states: "It was also the understanding of the working party that the phrase 'being imported . . . in such increased quantities' in Article XIX . . . was intended to cover cases where imports may have increased relatively, as made clear in . . . the Havana Charter."[91]

The substantive requirements deal with both injury and causation. There is the problem of what amounts to "serious injury". The GATT Working Party, dealing with the 1951 withdrawal by the United States of a tariff concession with respect to hatters' furs granted to Czechoslovakia, examined data on import quantities and United States production and employment in that industry and found evidence of "large and rapidly increasing . . . imports, while at the same time domestic production decreased or remained stationary." This in their opinion was "evidence of some weight in favour of the view that there was a threat of serious injury."[92] The Working Party said that the

> . . . *available data support the view that increased imports had caused or threatened some adverse effect to*

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[90] Idem.

[91] GATT BISD Vol. II at pp. 44-45 (1952).

[92] GATT Report on the Withdrawal by the United States of a Tariff Concession under Article XIX, Sales No. GATT/1951-3, at p. 21.

> *United States producers. Whether such a degree of adverse effect should be considered to amount to "serious injury" is another question, on which the data cannot be said to point convincingly in either direction, and any view on which is essentially a matter of economic and social judgment involving a considerable subjective element.*[93]

Also, the Working Party concluded that:

> *Moreover, the United States is not called upon to prove conclusively that the degree of injury caused or threatened in this case must be regarded as serious; since the question under consideration is whether they are in breach of Article XIX, they are entitled to the benefit of any reasonable doubt. No facts have been advanced which provided any convincing evidence that it would be unreasonable to regard the adverse effects on the domestic industry concerned as a result of increased imports as amounting to serious injury or a threat thereof; and the facts as a whole certainly tend to show some degree of adverse effects has been caused or threatened. It must be concluded, therefore, that the Czechoslovak Delegation has failed to establish that no serious injury has been sustained or threatened.*[94]

John Jackson observes that it "almost appears that a mere rapid increase in the proportion of imports to the domestic production would make the invocation of Article XIX justifiable, especially when all benefit of doubt goes to the party invoking it."[95]

The Working Pary also considered the question of the establishment or development of domestic production and observed that any

> *. . . proposal to withdraw a tariff concession in order to promote the establishment or development of domestic production of a new or novel type of product in which overseas suppliers have opened up a new market is not permissible under Article XIX but should be dealt with under other provisions of the agreement, such as Article XVIII. On the other hand, it may be permissible to have*

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[93] Ibid., at p. 22.

[94] Ibid., at p. 23.

[95] Jackson WORLD TRADE at p. 563.

> *recourse to Article XIX if a new or novel type of imported product is replacing the customary domestic product to a degree which causes or threatens serious injury to domestic producers.*[96]

The question of "unforeseen developments" were also considered by the Working Party. The Working Party agreed that

> *. . . "unforeseen development" should be interpreted to mean developments occurring after the negotiations of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated.*[97]

The Working Party observed that "it is universally known that fashions are subject to constant changes" but they agreed with the United States that "the degree to which the change in fashion affected the competitive situation, could not reasonably be expected to have been foreseen by the United States' authorities in 1947."[98]

The other requirement of the "effect of General Agreement obligations" is considered to encompass not only tariff concessions but also other obligations. The preparatory work shows that the elimination or reduction of quantitive restrictions was also included in that phrase.[99] The extraordinary increase of Japanese exports in particular goods and to certain countries, along with the increase in the exports of cotton textiles from the developing countries, during the 1950s gave rise to some apprehension in many developed countries and led in some instances to outright discrimination against exports from these countries.[100]

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[96] GATT Report on the Withdrawal . . . op. cit. at p. 21.

[97] Ibid., at p. 10.

[98] Ibid., at pp. 10-12.

[99] Report of Preparatory Committee London First Session at p. 10.

[100] GATT Doc. SR.15/17 at p. 153 (1959).

It is clear that the "escape clause" has certain drawbacks. If a local industry suffers serious injury as a result of concession-engendered import competition, the remedy most advocated is import restrictions, but this would penalize an efficient foreign producer as well as the consumer in the importing country. If the domestic industry as a whole does not suffer serious injury by such import competition, individual firms and workers may nevertheless be injured, and in such an instance escape clause relief does not lie and their adjustment problem, if any, would be similar to that applying to technological change.

6. ADJUSTMENT ASSISTANCE

Adjustment assistance has usually been associated with the economic concept of "cost of market adjustment". It is believed that an increase in world trade under "free trade conditions is likely to displace certain domestic products in the local market by imports. The question then arises as to who should bear the cost of this market readjustment since, it was believed, normal economic factors were inadequate to deal with this problem.

As early as 1959 at the GATT Ministerial Meeting and at the fifteenth session of the CONTRACTING PARTIES attention was drawn to the problem of "sharp increases in imports over a brief period of time [which] could have serious economic, political and social repurcussions in the importing countries."[101] At the sixteenth session in June 1960 of the CONTRACTING PARTIES appointed a Working Party to study the matter,[102] and at that time also adopted a description of market disruption as follows:

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[101] GATT Doc. SR.16/2 at pp. 8-10 (1960).

[102] GATT BISD 9th Supp. at p. 26 (1961).

> *These situations generally contain the following elements in combination:*
>
> *(i) a sharp and substantial increase or potential increase of imports of particular products from particular sources;*
>
> *(ii) these products are offered at prices which are substantially below those prevailing for similar goods of comparable quality in the market of the importing country;*
>
> *(iii) there is serious damage to domestic producers or threat thereof;*
>
> *(iv) the price differentials referred to in paragraph (ii) above do not arise from governmental intervention in the fixing or formation of prices or from dumping practices.*
>
> *In some situations other elements are also present and the enumeration above is not, therefore, intended as an exhaustive definition of market disruption.*[103]

The Working Party reported at the seventeenth session of the CONTRACTING PARTIES and recommended that a permanent committee[104] be established and it

> *. . . advocated a procedural approach to the problem under which (1) explicit recognition would be given to the "existence of a problem which has been called 'market disruption'"; (2) multilaterial consultations would be envisaged for arriving at "constructive solutions"; (3) the procedures adopted should lead to "the orderly expansion of international trade"; but (4) "existing rights and obligations under the General Agreement" should not be prejudiced.*[105]

Some methods of allocating market readjustment costs utilized include (1) staged reductions in tariffs or other restrictions over a

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[103] Ibid., at p. 106.

[104] Dam GATT at p. 298.

[105] Dam GATT at p. 298.

period of time, (2) for the importing country to reallocate the burden of adjustment from the domestic producers to other segments of the economy and (3) adjustment subsidies.[106]

It is clear that the "escape clause" provision under Article XIX in some measure provides an adjustment mechanism. However, John Jackson feels these "provisions seem much more attuned to protectionist desires than to an 'adjustment concept' . . . a significant question . . . [is] . . . whether the GATT agreement adequately focuses on the true problems of adjustment."[107]

The United States Trade Expansion Act of 1962[108] in section 301 (b) embodied on "escape clause" remedy of tariff adjustment into American law by proving

> (1) *Upon the request of the President upon resolution of either the Committee of Finance of the Senate or The Committee on Ways amd Means of the House of Representatives, upon its own motion, or upon the filing of a petition under . . . (petition for tariff adjustment filed by a trade association, firm, certified or recognized union, or other representative of an industry) the Tariff Commission shall promptly make an investigation to determine whether as a result, in major part of concessions granted under trade agreements, an article is being imported into the United States in such increased quantities as to cause, or threaten to cause, serious injury to the domestic industry producing an article which is like or directly competitive with the imported article.*
>
> (2) *In making its determination . . . the Tariff Commission shall take into account all economic factors which it considers relevant, including idling of productive facilities, inability to operate at a level of reasonable profit, and unemployment or underemployment.*

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[106] Jackson WORLD TRADE at p. 520.

[107] Idem.

[108] 76 U.S. Stat. 872 (1962).

> (3) . . . *increased imports shall be considered to cause, or threaten to cause, serious injury to the domestic industry concerned when the Tariff Commission finds that such increased imports have been the major factor in causing, or threatening to cause, such injury.*[109]

The "serious injury" had to affect an entire industry.[110]

In addition, under section 301 (c) of the same Act of 1962, an entirely new and more easily obtainable remedy--adjustment assistance--was incorporated for trade-injured domestic parties. As in the case of "escape clause" (or "tariff relief for industry") the Tariff Commission must find that

> *. . . as a result in major part of concessions granted under trade agreements, an article like or directly competitive with an article produced by the firm [the "workers' firm or an appropriate division thereof" in the case of a request for assistance by a group of workers] is being imported into the United States in . . . increased quantities. [However, the increased must, in the cast of firms be] "such . . . as to cause or threaten to cause injury to the firm" [or in the case of group of workers] "such . . . as to cause or threaten to cause unemployment and underemployment of a significant number or proportion of the workers of such firm or subdivision". . . . [It is further provided that] "increased imports shall be considered to cause or threaten to cause, serious injury to a firm or unemployment or underemployment as the case may be [if] such increased imports have been the major factor in causing or threatening to cause, such injury of unemployment or underemployment.*[111]

Stanley Metzger maintains that in

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[109] Fulda and Schwartz CASES at p. 396.

[110] Peter Bartfeld "United States Trade Law at the Crossroads of Presidential Power in the Trade Area after Yoshida International Inc. v. United States and the Trade Act of 1974" 8 New York University Journal of International Law and Politics 63 at p. 68 (1975).

[111] Fulda and Schwartz CASES at pp. 397-398.

> *. . . developing the concept of adjustment assistance, the Congress like the Administration, was fully aware that the traditional form of escape clause relief--increasing tariff rates or imposing quotas--even apart from adverse "impact on our total foreign economic policy", could be quite "inapprorpiate to protect United States firms and workers." Tariff relief "cannot be specifically adapted to the individual requirements of those in an industry affected by imports." The furnishing of adjustment assistance . . . on the other hand was "fully consistent with our traditional practice of protecting American commerce and labor from serious injury resulting from imports", while avoiding the difficulties flowing from tariff relief.*[112]

It is also clear that the criteria established for "adjustment assistance" were closely tied to that established for "escape clause" relief.[113] On the other hand, the eligibility requirements for adjustment assistance under the United States Automotive Products Act of 1965[114] for parties adversely affected by the operation of the Canadian-American Automotive Products Agreement of 1965 [115] were far less vigorous[116] than those provided under the Trade Expansion Act of 1962.

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[112] Stanley D. Metzger "The Escape Clause . . ." op. cit. at p. 381.

[113] Ibid., at pp. 381-385.

[114] 19 U.S.C.A. §2001-2033.

[115] United States-Canadian Automotive Products Agreement, January 16, 1965 [1966] 1 U.S.T. 1372, T.I.A.S. No. 6093.

[116] Under section 302 (b) (c) of the Automotive Products Trade Act of 1965, if a dislocation of a firm or a group of workers, an appreciable decline in the United States production and a corresponding increase in imports from Canada or decrease in the United States exports were to take place, injury to such firm or group of workers is presumed to flow from the concession granted under the Agreement and such firm or group of workers would be eligible for adjustment assistance.--Fulda and Schwartz CASES at pp. 421-423.

CHAPTER V

EXPORT CONTROLS

1. *NON-DISCRIMINATION RULE*

2. *SUBSIDIES*
   - 2.1 *Export Subsidies and Production Subsidies*
   - 2.2 *Agricultural Support Programmes*
   - 2.3 *Developing Countries Position*

3. *EXCEPTIONS*
   - 3.1 *General Exceptions*
   - 3.2 *Security Exceptions*

4. *BORDER TAX ADJUSTMENT*

Overview

This is concerned with the rules applicable to exports. The General Agreement mentions exports in quite a few articles. The general rule of non-discrimination and MFN treatment applies to both exports as well as to imports, but this is subject to a number of exceptions. Quantitive restrictions as applied to exports are also prohibited by the General Agreement. The provisions in the General Agreement on subsidies also apply to exports.

As mentioned previously the General Agreement permits exceptions and the general exceptions as well as the security exceptions found in the General Agreement equally apply to exports. It is maintained that basically there are three reasons for export restrictions: to protect domestic industries by providing them with less expansive domestic raw materials; to prevent or relieve critical shortages; and to improve the terms of trade.

The developing countries' position is that it is unjust for countries that export mostly primary products to commit themselves while at the same time the developed nations persist in their subsidies for primary products. As for "border tax adjustments" they usually take the form of remission of indirect taxes or drawback of custom duties on exportation. The rationale behind this is that if such indirect taxes were permitted to be levied on exports (which would then be reflected on the price for products in the country where the exports are destined) then the importing country through its consumers would be treated inequitably since the benefits of such indirect taxes would not be accruing to them.

It should be pointed out that there has recently been a call for the revision of GATT rules and the American Congress has advocated new principles and procedures governing access to supplies of food, raw materials, and manufactured or semi-manufactured products, including rules and procedures governing the imposition of export controls, the denial of fair and equitable access to such supplies, and effective consultative procedures on problems of supply shortages.

As far as the General Agreement is concerned, exports are mentioned in a number of Articles.[1] It is abundantly clear that most countries regulate at least some exports. There are usually various economic, political and national security reasons for this, but basically three reasons for export restrictions are: to protect domestic industries by providing them with less expensive raw materials; to prevent or relieve critical shortages, and to improve the terms of trade. The 1968 Brazilian controls on coffee exports[2] is clearly an example of applying controls to the export of raw materials used in a domestic industry, which not only protected that industry, but in fact gave the local industry a competitive advantage against other world producers. The 1973 foreign trade policy changes in a number of countries saw many of them limiting exports in order to keep the domestic price level down[3] as one method of fighting inflation. Also, in many other countries, concern about inflation brought about the use of price controls as a means to avert local shortages that tend to arise when traders shift sales abroad to take advantage of world prices that exceed domestic prices.[4] A recent example of this was the application of domestic price limits on sawn wood that led to the introduction of export controls when the world price increased above domestic price.[5]

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[1] At least 13 clauses in the General Agreement make some reference to exports:
Article I (1)--dealing with MFN treatment;
Article VI(1); (5); (6) and (7)--anti-dumping provisions;
Article VIII (1) and (4)--fees and formalities provisions;
Article IX (2)--marks of origin;
Article X (1)--publication and administration of trade laws and regulations;
Article XI (1) and (2)--quantitive restrictions;
Article XIII (1) and (5)--non-discriminatory administration of quantitive restrictions;
Article XVI--subsidies;
Article XVIII bis (1)--tariff negotiations;
Article XX--general exceptions and
Article XXI--security exceptions.

1. NON-DISCRIMINATION RULE

The MFN clause in Article I applies to both imports and exports, which means the application of the general rule of non-discrimination.

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[2] Journal of Commerce, 15 February 1968 at p. 5.

[3] IMF Survey, 9 July 1973 at p. 206.

[4] International Monetary Fund 24th ANNUAL REPORT ON EXCHANGE RESTRICTIONS at p. 463 (1973).

[5] GATT Doc. L/3875 (December 1973).

It follows from this that a Contracting Party cannot make a distinction in its export regulation depend on the destination of such exports. An early example of this was the 1948 Pakistani complaint to the CONTRACTING PARTIES against the Indian excise tax on tobacco, tea and sugar which was made refundable when the items were exported to all countries except Pakistan.[6] The matter was privately settled between the parties and the complaint was withdrawn.[7] In 1952 India complained to the CONTRACTING PARTIES that Pakistan discriminated in its export duty on raw jute against her.[8] It should be pointed out that a differential export tax on products would not itself violate the MFN obligation unless the export restrictions imposed were on "like" products. The Indian complaint concerned the export of raw jute packed in loose (kutcha) bales as against those packed in a hydraulic pressure and wire-bound (pukka) bales, whereby the "kutcha" type paid a higher export duty than the "pukka" bales. In 1953, the matter was brought before the Intersessional Committee and at one of the meetings the Chairman of the CONTRACTING PARTIES stated:

> *He had been asked whether, in his opinion, the export duty levied by Pakistan on kutcha bales was to be considered as a discriminatory tax under the provisions of the General Agreement. He had reflected upon this question and had concluded that, if kutcha bales were exported to various destinations and if the same rate of export duty were applied irrespective of the destination of the exports, the duty could not be regarded as discriminatory within the terms of the General Agreement.*[9]

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[6] GATT Doc. CP.2/SR.11 (1948).

[7] GATT Doc. CP.3/SR.19 (1949).

[8] GATT Doc. L/41 (1952).

[9] GATT Doc. IC/SR.9 at p. 2 (1953).

This opinion of the Chairman could only be correct if the two types of bales were not considered "like" products. This complaint also was later withdrawn when the parties privately compromised their differences.[10] It should be stressed that as previously indicated the General Agreement does contain a number of exceptions to the principle of non-discrimination which also apply to exports.

It must be pointed out that the General Agreement recognizes that international trade can be affected by tariff as well as non-tariff barriers. It, therefore, prohibits quantitive restrictions (subject to certain exceptions) and provides for multilateral negotiations to reduce tariffs. John Jackson maintains that the national treatment obligation under Article III does not apply to exports and that there is no explicit provision in GATT for "bindings" or Schedule concessions (under Article II) with respect to exports,[11] because in his view Article II refers only to importation. This position can only be maintained by a peculair interpretation of Article II, since what it in fact states is that "each Contracting Party shall accord to the commerce of the Contracting Parties treatment no less favourable than that provided for in the appropriate part of the appropriate schedule annexed to this Agreement."[12] Besides, at the 1946 London First Session, the Preparatory Committee considered the abolition of export restrictions and rejected it. The United States representative stated that:

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[10] GATT Doc. L/82 Add.1 (1953).

[11] Jackson WORLD TRADE at p. 499.

[12] Article II (1) (a)--Dam GATT at p. 393. It is also true that the remaining paragraphs of Article speaks of importation.

> *If we had put in this draft exactly what we ourselves would have liked there would have been a prohibition of export duties and a prohibition of restrictions on raw materials, [but he added that for some countries export duties have the same purpose as import duties for other countries] and therefore to be logical you must negotiate on that, too.*[13]

The British representative elaborated this and felt that

> *. . . there may be certain reasonableness in the idea that a country producing the raw material should be in those cases able to defend itself by reserving the right to have an export tax serving to prevent the processing industry from being completely taken away from it by an import duty in another country. . . . Having regard to that . . . it would not be altogether reasonable to require the complete abolition of export taxes, but, on the other hand, there may be a good case for asking for negotiation.*[14]

Further in Article XXVIII bis, which deals with tariff negotiations, the Contracting Parties recognized the importance of substantially reducing "the general level of tariffs and other charges on imports and exports."[15] Also, in the Note to Article XVII, the Contracting Parties stipulated that trade barriers caused by State-trading enterprises should be subject to negotiation so as to bring about "the reduction of duties and other charges on imports and exports."[16] Further, the GATT Schedules in fact contained one export binding--that relating to concessions on tin exports included in the Schedules of Malaysia and Singapore.[17] The purpose of

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[13] U.N. Doc. E/PC/T.C.II/ST/PV/1 at p. 11.

[14] Idem.

[15] Dam GATT at pp. 438-439.

[16] Ibid., at p. 459.

[17] GATT--CONSOLIDATED SCHEDULES OF TARIFF CONCESSIONS Volume 3 at p. 135--"Export Duties: Tin ore and tin concentrates shall be assessed for duty on the basis of their content: the rate to be levied, on such tin content being the same as the rate chargeable on smelted tin, Provided that the rate of duty on this item

[Continued on next page.]

that concession was to prevent Malaysia and Singapore from placing a high export duty on tin ore which would amount to a subsidy for tin smelting. The low export tax was made subject to the United States' government not subsidizing the American tin smelting industry. Also, it should be mentioned that in import tariff committments there have been provisos or Notes attached making the granting of such import tariff concessions dependent upon the absence of export duties by the recipient Contracting Party. The proviso to a British import tariff concession on yarns provides:

> *The Government of the United Kingdom shall be free to impose on yarns containing flax a duty higher than provided for in respect of the above item if at any time supplies of raw flax for export from the territories of Belgium, Luxembourg or the Netherlands are subjected to duties or other charges on exportation.*[18]

Similarly, the British import tariff on unshelled Brazil nuts was placed at 5 per cent and on shelled at 10 per cent. The Note to that concession stated:

> *If at any time unshelled Brazil nuts exported from Brazil are charged with export duties or other taxes which are not offset by corresponding export duties or taxes on shelled Brazil nuts exported from Brazil, then the Government of the United Kingdom shall be free to impose on shelled Brazil nuts, in addition to the 10% provided for in this item, a duty equivalent to the amount by which the aforesaid export duties or taxes on unshelled Brazil nuts exported from Brazil exceed the duties or taxes charged on unshelled Brazil nuts supplied to the domestic shelling industry.*[19]

[Continued from p.166]
may exceed the rate chargeable on smelted tin in the event that and so long as the Government of the United States of America subsidizes directly or indirectly the smelting of tin in the United States."

[18] Ibid., at p. 114.

[19] Ibid., at p. 12.

Article XI (1) states that

> *No prohibitions or restrictions . . . , whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any Contracting Party . . . on the exportation or sale for export of any product destined for the territory of any other Contracting Party.*[20]

However, this was made subject to certain exceptions found in Article XI (2):[21] the first refers to export prohibitions or restrictions temporarily applied to prevent to relieve critical shortages of foodstuffs or other products essential to the exporting Contracting Party; and the second applies to export prohibitions or restrictions necessary for grading standards in international trade. Also, the general exceptions under Article XX[22] and the national security exceptions under Article XXI[23] are also applicable in appropriate cases.

In 1950 the CONTRACTING PARTIES specifically discussed quantitive restrictions and found that "many countries have made extensive use of restrictions on exports, in order to protect their supplies of scarce commodites."[24] The CONTRACTING PARTIES concluded that the following kinds of quantitive restrictions fall outside the exceptions permitted:

> *(i) export restrictions used by a contracting party for the purpose of obtaining the relaxation of another contracting party's import restrictions;*

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[20] Dam GATT at p. 407.

[21] Ibid., at pp. 407-408.

[22] Ibid., at pp. 407-428.

[23] Ibid., at pp. 427-428.

[24] GATT--THE USE OF QUANTITIVE RESTRICTIONS FOR PROTECTIVE AND OTHER COMMERCIAL PURPOSES at p. 4 (1950).

> *(ii) export restrictions used by a contracting party to obtain a relaxation of another contracting party's export restrictions on commodities in local or general short supply, or otherwise to obtain an advantage in the procurement from another contracting party of such commodities;*
>
> *(iii) restrictions used by a contracting party on the export of raw materials, in order to protect or promote a domestic fabricating industry; and*
>
> *(iv) export restrictions used by a contracting party to avoid price competition among exporters.*[25]

Article XIII provides for non-discrimination in administering quantitive export restrictions.[26]

As for dumping, Article VI (1) states that the Contracting Parties recognize that dumping--export of products at less than the normal value--is to be condemned if it causes or threatens material injury to an established industry or materially retards the establishment of a domestic industry. It is clear from the foregoing that dumping is not against GATT obligations, and what is of significance is the right to offset or prevent dumping. In order to defend against this practice importing countries are permitted to levy anti-dumping duties, but any anti-dumping duty levied must not be greater in amount than the margin of dumping, which is the price difference determined in accordance with Article VI (1).[27]

2. SUBSIDIES

The provisions dealing with subsidies in the General Agreement must be viewed in light of what happened just after the Second World

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[25] Ibid., at pp. 5-6.

[26] Dam GATT at pp. 411-413.

[27] Ibid., at p. 400.

War. Many European countries had resorted to the use of subsidies, owing to balance of payments difficulties as well as to problems concerning the reconstruction of their economies. Subsidies were, according to the prevailing American philosophy at that time, to be discouraged since they diverted world trade from its normal path and in fact distorted the structure of production which it was believed should have been determined by comparative costs. It was felt that the result of subsidization was to allow competitors to gain an advantage in their trade, not because of their superior productivity in a free enterprise system, but because of the advantages gained through public aid. Originally Article XVI made no distinction between export and other subsidies. It contained no provision for the abulition of export subsidies on non-primary products, nor did it provide for the special treatment of subsidies on primary products.[28] The only obligation was to notify.

It was argued that subsidizing domestic products gave protection from imports since it allowed a domestic producer to sell at a price below that for imports from abroad. Also, a subsidy could be used to promote exports by enabling it to be shipped to a foreign market to be sold there at a price below the foreign market price. A nation could subsidize all domestic production of a product, thereby permitting a lower domestic as well as a lower export price. The general subsidy is sometimes referred to as a "production subsidy". A government may just subsidize the domestically produced goods destined for export, thereby allowing them to be sold at a price lower than that for the domestic market. A subsidy exclusively for export was termed an "export subsidy".[29]

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[28] Gerard Curzon op. cit. at pp. 119 and 180

[29] Dam GATT at pp. 132-146.

2.1 Export Subsidies and Production Subsidies

Article XVI contains basically three obligations: (1) to notify GATT about any subsidy "which operates directly or indirectly to increase exports . . . or to reduce imports" and to consult on them (Article XVI (1)); (2) not to grant export subsidies on primary products that would result in "more than an equitable share of world export trade" for the subsidizing state (Article XVI (3)); and (3) to cease export subsidies on any non-primary product (Article XVI (4)).[30] In addition Article VI relating to countervailing duties must be viewed as a countermeasure to export subsidies. It is clear that neither Article XVI nor Article VI prohibits subsidies, but it does provide remedies to counteract them. Similarly Article XIX (1) permits a remedy--emergency action in cases where foreign subsidies have caused any product to be imported "in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products."[31] Also Article XXIII provides a remedy as well--giving certain rights of consultation and, in extreme cases, suspension of GATT concessions or obligations where any Contracting Party considers that any benefit accruing is being nullified or impaired.[32]

In a report adopted in 1955 by the CONTRACTING PARTIES, it was stated:

> *So far as domestic subsidies are concerned, it was agreed that a contracting party which has negotiated*

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[30] Ibid., at pp. 416-417.

[31] Ibid., at p. 426.

[32] Ibid., at p. 429.

> *a concession under Article II may be assumed, for the purpose of Article XXIII, to have a reasonable expectation, failing evidence to the contrary, that the value of the concession will not be nullified or impaired by the contracting party which granted the concession by the subsequent introduction or increase of a domestic subsidy on the product concerned.*[33]

Also, in 1955 a GATT Working Party agreed that

> *. . . there was nothing to prevent contracting parties, when they negotiate for the binding or reduction of tariffs, from negotiating on matters, such as subsidies, which might affect the practical effects of tariff concessions, and from incorporating in the appropriate schedule annexed to the Agreement the results of such negotiations; provided that the results of such negotiations should not conflict with other provisions of the Agreement.*[34]

The possibility of negotiating the level of subsidies was made in the procedural rules for the Kennedy Round.[35]

There is no general definition in the General Agreement of the term "subsidy". In 1961 a Panel on subsidies

> *. . . considered that it was neither necessary nor feasible to seek any agreed interpretation of what constituted a subsidy. It would probably be impossible to arrive at a definition which would at the same time include all measures that fall within the intended meaning of the term in Article XVI without including others not so intended. . . . In any event the Panel felt that the lack of a precise definition had not, in practice, interfered with the operation of Article XVI.*[36]

Article XVI (1) provides that a Contracting Party must notify if it

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[33] GATT BISD 3rd Supp. at p. 224.

[34] Ibid., at p. 225.

[35] GATT BISD 12th Supp. at p. 36.

[36] GATT BISD 10th Supp. at p. 208.

> *. . . grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any produce from, or reduce imports of any product into, its territory. . . .*[37]

In a 1948 Working Party report approved by the CONTRACTING PARTIES the phrase "increased exports" was meant "to include the concept of maintaining exports at a level higher than would otherwise exist in the absence of the subsidy."[38] A 1960 GATT Panel stated that it was not adequate "to consider increased exports or reduced imports only in an historical sense."[39] It noted that to decide the question of increased exports or reduced imports "the criterion is therefore what would happen in the absence of a subsidy" and it considered "it fair to assume that a subsidy which provides an incentive to increase production will, in the absence of offsetting measures, e.g., a consumption subsidy, either increase exports or reduce imports."[40] Further, at the 1947 Geneva Conference, the drafters agreed that within the notion of "indirect" subsidy was included differential internal transport charges where the granting of decreased charges on goods for exports would "operate directly or indirectly to increase the exports of any product."[41] The Interpretative Note to Article XVI states tax exemption or remission is not to be deemed a subsidy if the exemption or remission on an exported product does not exceed those accrued by the like product when destined for domestic consumption.[42] The implication of this Interpretative Note is that if the exemption or remission does exceed the amount of taxes on domestically consumed products then the excess is deemed to be a subsidy. Dealing with "any form of income or price support" that operates to increase exports and decrease imports, a 1960 Panel noted that it was generally true that a method "under which a government, by direct or indirect methods, maintains such a price by purchases and resale at a loss is a subsidy;" but it stated that there was a way by which a government could maintain a fixed price above the world price without resort to a subsidy--a regulated minimum price "which is maintained by Quantitive Restrictions or a Flexible Tariff or similar charges"[43] as long as it did not conflict with other relevant articles of the General Agreement.

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[37] Dam GATT at p. 416.

[38] GATT BISD Vol. II at p. 44 (1952).

[39] GATT BISD 9th Supp. at p. 191.

[40] Idem.

[41] U.N. Doc. E/PC/T.127 at p. 1.

It is also clear that GATT is not concerned, as noted by a 1960 GATT Panel, with "such action by private persons acting independently of their governments except insofar as it allows importing countries to take action under other provisions of the Agreement."[44] However, a plan "in which the government took part either by making payments into the common fund or by entrusting to a private body the functions of taxation and subsidization" fell within the obligation to notify.[45]

Also, the Interpretative Note specifically provides that "Nothing in Section B [of Article XVI] shall preclude the use by a Contracting Party of multiple rates of exchange in accordance with the Articles of Agreement of the International Monetary Fund."[46]

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[42] Dam GATT at p. 458.

[43] GATT BISD 9th Supp. at p. 188.

[44] Ibid., at p. 192

[45] Idem.

The notification provision requires that it must be in writing and show "the extent and nature of the subsidization"; "the estimated effect of subsidization on the quantity of the affected product or products imported into or exported from its territory"; and "the circumstances making the subsidization necessary."[47] This obligation provides suitable evidence for an anti-dumping or countervailing response by a Contracting Party. Further, there is also the requirement under Article XVI (1) that

> *In any case in which it is determined that serious prejudice to the interests of any other Contracting Party is caused or threatened by any subsidization, the Contracting Party granting the subsidy shall, upon request, discuss with the other Contracting Party or Parties concerned, or with the* CONTRACTING PARTIES, *the possibility of limiting the subsidization.*[48]

In dealing with this aspect, the CONTRACTING PARTIES in 1962 agreed that no prior determination by it was required of serious prejudice before a Contracting Party may request consultations.[49] If bilateral consultations do not produce satisfactory results, the CONTRACTING PARTIES can be approached. It should be mentioned that consultations can also take place under the procedures of Article XXII[50] or Article

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[46] Dam GATT at p. 458.

[47] Ibid., at p. 416.

[48] Idem.

[49] GATT BISD 10th Supp. at pp. 206-207.

[50] Dam GATT at p. 429.

XXIII.[51]

Article XVI (3) provides that

> *. . . Contracting Parties should seek to avoid the use of subsidies on the export of primary products. If, however, a Contracting Party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that Contracting Party having more than an equitable share of world export trade in that product, account being taken of the shares of the Contracting Parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.*[52]

"Primary products" is defined in the Interpretive Note as

> *For the purposes of Section B, a "primary product" is understood to be any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.*[53]

From the foregoing, both "export subsidies" and "production subsidies" are covered, if the latter has the effect of increasing exports. Also, the use of subsidies for primary products is not prohibited, only "parties should seek to avoid" it. The "equitable share-representative period" approach would seem to operate to the detriment of the developing countries. To guard against this, the Interpretive Note states: "The fact that a Contracting Party has not exported the product in question during the previous representative period would not in itself preclude that Contracting Party from establishing its right to obtain a share of the trade in the product concerned."[54] During the 1955 meeting of the CONTRACTING PARTIES the draftsmen, of the amendments then presented, agreed that in deciding "equitable shares" the CONTRACTING PARTIES should consider

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[51] Ibid., at pp. 429-430.

[52] Ibid., at pp. 416-417.

[53] Ibid., at p. 458.

> (a) *the desirability of facilitating the satisfaction of world requirements of the commodity concerned in the most effective and economic manner, and*
>
> (b) *the fact that export subsidies in existence during the selected representative period may have influenced the share of the trade obtained by the various exporting countries.*[55]

Also, during this Ninth Session in 1955, some delegates wanted to interpret the words "world markets" as meaning "individual markets", but ~~the~~ United States refused to accept such an interpretation.[56] In 1959 a Working Party appointed to examine the Australian complaint about French wheat sales, affirmed that a country's equitable share is established by inspecting world markets rather than looking at individual markets.[57] In a 1967 GATT Working Party study prepared (due to the charges laid against the American subsidy on tobacco by Malawi) revealed the problem of the "equitable share" obligation and it was noted that Malawi had complained that "the lack of clarity as regards the provisions of Article XVI:3 would seem to call for the establishment of some ground rules by the CONTRACTING PARTIES."[58]

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[54] Idem.

[55] GATT BISD 3rd Supp. at p. 226.

[56] GATT Doc. SR.9/41 at p. 6.

[57] GATT BISD 7th Supp. at pp. 52-53.

[58] GATT BISD 15th Supp. at p. 123.

2.2 Agricultural Support Programmes

It should be pointed out that as far as domestic agricultural support programmes are concerned, the Interpretive Note makes specific exception for certain price stabilization schemes.[59] The intent was to except price stabilization systems even if they caused export prices to drop below domestic prices at times, provided the schemes satisfied the two specified conditions: that they sometimes resulted or were designed to result in export sales at higher prices than domestic sales and that they operated in such a way as not to unduly stimulate exports.

Article XVI (4) states that Contracting Parties shall cease

> *. . . to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957 no Contracting Party shall extend the scope of any such subsidization beyond that existing on 1 January 1955 by the introduction of new, or the extension of existing, subsidies.*[60]

The date 31 December 1957 in the second paragraph was termed the "standstill" provision. The Interpretive Note provides that

> *The intention of paragraph 4 is that the Contracting Parties should seek before the end of 1957 to reach agreement to abolish all remaining subsidies as from 1 January 1958; or, failing this, to reach agreement to extend the application of the standstill until the earliest date thereafter by which they can expect to reach such agreement.*[61]

Subsequently extensions were made to this "standstill" obligation, and for those countries that accepted paragraph 4, some attached reservations. The United States' acceptance of the "Declaration Giving Effect to . . . Article XVI, paragraph 4" in fact states

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[59] Dam GATT at p. 458.

[60] Ibid., at p. 417.

[61] Ibid., at p. 459.

> *With the understanding that this Declaration shall not prevent the United States, as part of its subsidization of exports of a primary product, from making a payment on an exported processed product (not itself a primary product), which has been produced from such primary product if such payment is essentially limited to the amount of the subsidy which would have been payable on the quantity of such primary products, if exported in primary form, consumed in the production of the processed product.*[62]

The net result was that Article XVI (4) does not apply to all GATT members--in all some 16 or 17 Contracting Parties (most of them industrialized nations) have accepted it.

It can be clearly discerned from the foregoing that paragraph 4 contains many potential difficulties. By its terms it was only to apply to "any product other than a primary product". Another question, was the use of the word "price", was this meant to indicate "f.o.b." or "c.i.f." prices? Further, was there any connection between the use of "price" in paragraph 4 and that found in Article VI--dealing with anti-dumping and countervailing duties?

2.3 Developing Countries' Position

The developing countries' position on export subsidies is best exemplified by India's argument that it is unjust for countries that export mostly primary products to commit themselves while the developed nations persisted in their subsidies for primary products.[63]

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[62] 445 UNTS 294 at p. 303 (1962).

[63] GATT Doc. SR.17/3 at p. 19 (1960).

It is clear from the foregoing examination of Article XVI that:

(a) a distinction is made between subsidies of primary products and non-primary products,

(b) the Article deals with the concept of an "equitable share of world export trade" as applied to primary products,

(c) the remission of indirect taxes (as well as multiple exchange rates) is not considered as amounting to an export subsidy.

(d) an effort is made to indicate that a subsidy arises when the price of the product exported is below that for the like product in the domestic market.

The effect of the GATT provisions on subsidies is that only export subsidies on a product other than a primary product are to be abolished, while primary products are subject to the requirement that parties "should seek to avoid the use of subsidies" on them. The distinction between primary products and non-primary products has been subjected to a considerable amount of criticism by the primary producers in the export market. Australia stated that

> *The Article was weak because of the glaring and invidious comparison between weak limitations on subsidies of primary products as compared with the ban on subsidies of manufactured goods. There was an element of unfairness in making such a distinction. Moreover, by referring to equitable "shares of world trade" and not of "individual markets" the Article sought to solve the problem of primary products from the wrong end, since the danger of export subsidies was greatest in individual markets. It was possible to argue that notwithstanding damage being done by subsidization in individual markets a country's total share of world exports was not being increased.*[64]

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[64] GATT Doc. SR.9/41 at p. 3 (1955).

Some attempt was made to provide for this criticism in Article XVI (5), whereby the CONTRACTING PARTIES could review the provisions relating to subsidies "from time to time" so as to determine its effectiveness.[65]

In order to appreciate the position of the developing countries on export subsidies, it becomes necessary for us to provide some background as to the motives and purpose behind the provisions. As early as 1945, Percy W. Bidwell in his article "A Commercial Policy for the United Nations" said that

> *. . . it will probably not be possible in a multilateral agreement to secure agreement to prohibit subsidies on production . . . one country may wish on grounds of political security to subsidize a strategic industry, a mature industrial state seeking a balanced social structure may wish to maintain a fixed proportion of its population on the land, a country that is backward industrially may wish to increase productivity by the development of manufacturing. For each of these purposes subsidies on production are less objectionable than tariffs, first because the costs of subsidies are more easily ascertainable and secondly being paid out of a general fund, the burden of the subsidy is more equitable and more widely distributed than a tariff.*[66]

As W. A. Brown Jr. points out it was the industrialized nations that were in favour of the use of subsidies rather than quantitive restrictions or tariffs for economic development, while the developing countries were strongly opposed to this and managed to exclude all reference to subsidies in the provisions dealing with economic development.[67] And understandably so, as one delegate to the London First Session of the Preparatory Committee in October 1946 pointed out the fact that "only the richer countries were able adequately to support their industries by means of subsidies."[68]

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[65] Dam GATT at p. 412.

[66] Quoted in Wilcox TRADE CHARTER at p. 126.

[67] W. A. Brown Jr. THE UNITED STATES AND THE RESTORATION OF WORLD TRADE at pp. 98-99 (1950).

At that time Robert P. Terrill of the United States' Department of State explained the difference between production subsidies and export subsidies in the following way:

> *A domestic subsidy consists of special payments by a Government to producers of a product to stimulate its output; unlike an export subsidy, such a domestic payment does not result in a difference between the selling price of the product on the home market and on the export market in case a part of it is sold abroad. . . . Export subsidies consist of special payments or bonuses by a Government on the export of a product enabling it to be sold in a foreign market at a lower price than it is sold at home, thus capturing markets which could not be obtained under ordinary competitive conditions. Moreover, the subsidy payment may be so administered as to discriminate between different foreign markets. Competing producers in other countries usually consider this form of subsidy to be particularly destructive, and, in retaliation, other Governments frequently resort to higher tariffs, quantitive restrictions, or other trade barriers.*[69]

Moreover, it was felt that export subsidies resulted in the introduction of tariffs or quantitive restrictions so as to prevent the re-importation of the subsidized export.

While considering domestic or production subsidies and export subsidies, it might be pertinent to observe that Jacob Viner holds that

> *. . . the only characteristic of foreign bounties which makes them objectionable to import countries is their tendency to produce artificial, and therefore temporary, cheapness of the bounty-fed commidities. . . . [Since] production bounties granted to the entire output, regardless of whether or not it is destined for export, also*

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[68] U.N. Doc. E/PC/T/33 at p. 16 (1946).

[69] Robert P. Terrill HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION INCLUDING A GUIDE TO THE STUDY OF THE CHARTER at p. 8 (1968).

> *bring about artificial cheapness, although they have no particular tendency to result in dumping in the proper sense of the term, there would be as much reason for the application of countervailing duties to commodities which receive general bounties upon production as commodities which receive bounties only upon their export to other countries.*[70]

With the United States committed to a post-Second World War commercial policy based on the principles of free market economies, the foregoing distinction between production subsidies and export subsidies played a major part in the draft Charter submitted by it to the Preparatory Committee at its London Session. The American position[71] was that there was no need for special provisions since the Charter would permit, without serious qualificiation, the use of governmental subsidies for the purpose of establishing and expanding a manufacturing industry. The draft Charter in Article 25 laid down the following requirements:

> *(i) If the subsidy does not reduce imports, no requirements are made.*
>
> *(ii) If the subsidy does reduce imports, the only request is that it is to be reported to the International Trade Organization together with an indication concerning the probable effect of the subsidy and the reason why it is necessary.*
>
> *(iii) Even if the subsidy should cause serious prejudice to international trade, the only requirement is that members granting it discuss with members whose interest is seriously prejudiced, the possibility of limiting the subsidy.*[72]

The differentiation between primary products and non-primary products was based on the United States' internal agricultural policy of that time. The United States had subsidies on cotton and wheat and felt that it required these in order to maintain for the United States a fair share of the world market.[73] Thus the provisions found in Article XVI maintained the position sought by the United States.

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[70] Jacob Viner "A Memorandum on Dumping" in Augustus Kelly DUMPING: A PROBLEM IN INTERNATIONAL TRADE-- Reprint of Economic Classics at p. 364 (1966).

[71] Jackson WORLD TRADE at p. 368.

[72] UNITED STATES SUGGESTED CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION, Dept. of State Pub. No. 2598 at pp. 18-20.

It is clear that the basic idea in the General Agreement on subsidies was to impede unfair advantage of one competitor over another. There may be instances where, due to unrealistic exchange rates and high internal costs, a country's domestic price is above world market price. It may not be possible to adjust such an exchange rate by devaluation or to reduce the domestic price level through deflationary policies. In such cases, subsidies to exporters may be needed to rectify the competitive condition of the country. With the present method of dealing with subsidies, exporters of a country with overvalued currency are prevented from competing on an equal footing. E. Kung maintains that the "developing countries' currencies are mostly overvalued rather than underrated".[74] Further, most developing countries also suffer from balance of payments difficulties and also maintain foreign exchange controls.

The use of subsidies is of prime significance to the developing countries. The prohibition would seriously frustrate the principles and objectives of Article XXXVI.[75] As mentioned previously the developing countries have not accepted Article XVI (4), and they have not been very sympathetic generally to Section B of Article XVI.

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[73] W. A. Brown op. cit. at p. 26.

[74] Emil Kung "Subsidies to Exports in Developing Countries" INTER-ECONOMICS No. 11, November 1967 at p. 297 (1967).

[75] Dam GATT at pp. 443-444.

The "harmful effect of the existing definition [of subsidy] for the developing countries is not a remote and doubtful possibility but rather an indisputable certainty, since most developing countries are countries which suffer from balance-of-payments difficulties, maintain controls and have overvalued currencies."[76] Michael Rom believes that such a definition does not distinguish between "compensatory" and "real" subsidies. By compensatory he means that where duties are imposed on imports or means of production (thereby making the domestic producer, who utilizes these imported products in the manufacture of exports, suffer a disadvantage as against a foreign competitor) the remission of such duties on the exported product eliminates such false competition and is considered a compensatory subsidy. As a possible remedy to the situation he suggests that

> . . . export subsidies should be defined as an unfair practice when the product is sold in an export market not only at a price which is below the domestic price in the exporting country, but also below the price in the importing country from any other source. In other words, as long as the subsidy is not undercutting world market prices it should be considered as compensatory and thus permissible.[77]

Michael Rom maintains that the "case of most developing countries is, however, that they suffer from a structural foreign exchange gap (which may be acute or potential). In such a case conventional trade theory and policy do not apply."[78] He emphasizes that "if a country suffers from an acute foreign exchange gap, an alteration in the exchange rate will not bring about the necessary adjustment."[79] He stresses that "the fact that developing countries suffer from overvaluation of their currencies does not result from incorrect economic policies, but rather should be attributed to the special conditions and problems faced by these countries."[80] He maintains that

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[76] Michael Rom "GATT: Export Subsidies and Developing Countries" 2 J.W.T.L. 544 at p. 559 (1968).

[77] Ibid., at p. 558.

[78] Ibid., at p. 560.

> *. . . [o]n the contrary most economists agree that there is no single universal trade and payments policy which best applies to the situations of economic development. Thus, a case-by-case approach is needed which tailors policies to the individual country's situation, and even prescribes a "mix" of measures to be taken which may of course include devaluation in some cases.*[81]

Also, of importance is the fact that Article VI, which deals with the countermeasures available to the Contracting Party, does not provide special treatment for developing countries, and in fact does not differentiate between developed and developing countries.[82] Some advocate that a paragraph should have been included in Article VI which would have restricted more severely the right to impose countervailing duties on the exports of the developing countries.

3. EXCEPTIONS

Article VIII (1) provides that fees and charges on exports other than duties or internal taxes "shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of . . . exports for fiscal purposes."[83] Similarly, Article X (1) states

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[79] Idem.

[80] Ibid., at p. 561.

[81] Idem.

[82] Ibid., at p. 563.

> *Laws, regulations, judicial decisions and administrative rulings of general application, made effective by a Contracting Party, pertaining to . . . requirements, restrictions or prohibitions on . . . exports . . . shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.*[84]

3.1 General Exceptions

The general exceptions are listed in Article XX, with the qualification that

> *Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Contracting Party of measures.*[85]

The specified categories include those measures (1) to protect public morals; (2) to protect human, animal or plant life or health; (3) relating to gold and silver; (4) relating to enforcement of certain monopolies, protection of patents, trade marks, and copyrights, and the prevention of deceptive practices; (5) protecting national treasures; (6) conserving exhaustible natural resources; (7) undertaken in pursuance of obligations under any intergovernmental commodity agreement conforming to criterias approved by the CONTRACTING PARTIES.[86] Further, Article XX, sub-paragraph (i) exempts measures

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[83] Dam GATT at p. 404.

[84] Ibid., at p. 406.

[85] Ibid., at pp. 427-428.

[86] Idem.

> . . . *involving restrictions on exports of domestic materials necessary to assure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination.*[87]

Also, exemption is afforded to measures "essential to the acquisition of distribution of products in general or local short supply" provided that such measures shall be "consistent with the principle that all Contracting Parties are entitled to an equitable share of the international supply of such products"[88] in Article XX, sub-paragraph (j). This sub-paragraph also has a provision that the CONTRACTING PARTIES shall review the need for it not later than 30 June 1960. This was extended by the CONTRACTING PARTIES to 1970.[89] It is pertinent to observe that in 1947 at Geneva discussions held hinted that by the expression "local short supply" was

> . . . *understood to include cases where a product, although in international short supply, was not necessarily in short supply in all markets throughout the world. It was not used in the sense that every country importing a commodity was in short supply, otherwise it would not be importing it.*[90]

It should also be pointed out that the Working Party drafting the 1955 amendments to the General Agreement observed that the original provisions of Article XX were "adopted to take care of temporary situations arising out of the war."[91]

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[87] Ibid., at p. 428.

[88] Idem.

[89] GATT BISD 13th Supp. at p. 18 (1965).

[90] U.N. Doc. E/PC/T/A/SR.40 (2) at p. 15 (1947).

3.2 Security Exceptions

As for the provisions relating to essential security interests, Article XXI states .

> *Nothing in this Agreement shall be construed*
>
> *(a) to require any Contracting Party to furnish any information the disclosure of which it considers contrary to its essential security interests; or*
>
> *(b) to prevent any Contracting Party from taking any action which it considers necessary for the protection of its essential security interests*
>
> *(i) relating to fissionable materials or the materials from which they are derived;*
>
> *(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly to the purpose of supplying a military establishment;*
>
> *(iii) taken in time of war or other emergency in international relations; or*
>
> *(c) to prevent any Contracting Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.*[92]

From the outset and as early as 1947 it was recognized by the participants to the Preparatory Conference that "some latitude must be granted for security as opposed to commercial purposes" and that "the spirit in which Members of the Organization would interpret these provisions was the only guarantee against abuse."[93] During the 1949 GATT Session, it was stated that "every country must have the last resort on questions relating to its own security. On the other hand, the CONTRACTING PARTIES should be cautious not to take any step which might have the effect of undermining the General Agreement."[94]

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[91] GATT BISD 3rd Supp. at p. 230 (1955).

[92] Dam GATT at pp. 428-429.

During the 1961 GATT Nineteenth Session dealing with Portuguese accession to the General Agreement, Ghana announced its ban of Portuguese products, invoking Article XXI, stating that

> *. . . under this Article each contracting party was the sole judge of what was necessary in its essential security interest. There could therefore be no objection to Ghana regarding the boycott of goods as justified by security interests. It might be observed that a country's security interests might be threatened by a potential as well as an actual danger. The Ghanaian Government's view was that the situation in Angola was a constant threat to the peace of the African continent and that any action which, by bringing pressure to bear on the Portuguese Government, might lead to a lessening of this danger, was therefore justified in the essential security interests of Ghana.*[95]

The 1966 United Nations Security Council action imposing a trade embargo on Rhodesia,[96] which has been adopted by a number of GATT members, is a good example of measures that fall under Article XXI, sub-paragraph (c).

It is abundantly clear that many

> *. . . raw material producing countries are resorting to export restrictions to further the development of domestic processing industries. Some oil producers limit crude oil exports to promote industries processing oil, other countries limit leather exports to help their shoe industries,*

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[93] U.N. Doc. E/PC/T/A/SR 33 at p. 3 (1947).

[94] GATT Doc. CP.3/SR.22 at p. 7 (1949).

[95] GATT Doc. SR.19/12 at p. 196 (1961).

[96] Security Council Resolution 232 of 16 December, 1966--1966 Y.B.U.N. at p.116-117.

> *coffee growing countries restrict the export of green coffee but not that of soluble coffee, etc. Schemes to promote exports of manufactured goods by discouraging export of raw materials have had a significant impact on the trade of some countries. Thus, the total imports of leather by developed market economy countries from Pakistan rose from $4 million to $30 million between 1962 and 1968 while during the same period their imports of hides and skins from that country fell from $10 million to only $1 million. Brazilian soluble coffee exports to the United States soared from 1 per cent of the U.S. soluble market in 1965 to 14 per cent in 1967 because Brazil introduced differential coffee export taxes favouring processed coffee.*[97]

The outcome of all this has led to a

> *. . . tendency of the raw material exporting countries to levy high export duties on raw materials and low or no duties on finished products correspondingly to a tendency in the raw material importing countries to levy import duties that rise with the degree of processing.*[98]

This situation conforms to the advice given by Josiah Tucker in 1757 that "taxes on exports should vary inversely with their completeness of manufacture, even to the extent of absolute prohibitions of export for raw materials, while taxes on imports should vary directly with their completeness of manufacture."[99]

Export controls have also been utilized to improve a country's terms of trade, and crude oil, tin and coffee producers have been successful in this. "When foreign demand for a product is inelastic, a reduction in the quantity of exports leads to an expansion of exports by value. By exporting less the restricting country then earns the financial resources to import more."[100]

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[97] Frieder Roessler "GATT and Access to Supplies" 9 J.W.T.L. 25 at p. 31 (1975).

[98] Idem.

[99] Jacob Viner STUDIES IN THE THEORY OF INTERNATIONAL TRADE at p. 64 (1955).

Another important part export restrictions can play is in the area of establishing processing industries. Thus,

> *. . . a less developed oil-producing country could, through export restrictions on crude oil, easily attract petrochemical industries, but it might prefer to industrialize in labour intensive, low-technology sectors so as to protect itself against the day when its oil reserves are depleted, new sources of energy are found or the petroleum exporting countries' cartel breaks down. The country could therefore try . . . to improve its terms of trade by taxing uniformly oil and oil-products, but renounce the possibility to establish or further oil-processing industries with the help of differential export taxes.*[101]

4. BORDER TAX ADJUSTMENT

There is also the question of border tax adjustments. As far as exports are concerned, it would seem that the Interpretive Note to Article XVI specifically deals with this by providing

> *The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued shall not be deemed to be a subsidy.*[102]

It should be pointed out that the expression "borne by" must have the same meaning as that found in Article VI (4) which provides that no product imported shall be subject to a countervailing duty "by reason of the exemption of such products from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes."[103]

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[100] Frieder Roessler op. cit. at p. 32.

[101] Ibid., at p. 33.

[102] Dam GATT at p. 458.

In 1960 a Working Party Report adopted by the CONTRACTING PARTIES catalogued a number of practices as amounting to subsidies. Listing among these the remission of direct taxes or social welfare charges on industrial and commercial enterprises and the "exemption in respect of exported goods, of charges or taxes, other than charges in connection with importation or indirect taxes levied at one or several stages on the same goods if sold for internal consumption."[104] It would seem to be the case that the expression "borne by" and "levied on" (found in the Working Party Report) are being used similarly.

In 1961 a Group of Experts in their report to GATT stated that countervailing duties "should not be imposed on a product by reason of the exemption of such product from duties or taxes imposed on the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes."[105] Previously. in 1951, soon after the General Agreement was entered into an amendment was sought by the United States Executive to the United States law on countervailing duty to make it conform with the GATT obligation, which read in part

> *The exemption of any exported article from a duty or tax imposed on like articles or merchandise when destined for consumption in the country of origin or exportation, or the refunding of such a duty or tax, shall not be deemed to constitute a payment or bestowal of a bounty or grant within the meaning of this section.*[106]

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[103] Ibid., at p. 401.

[104] GATT BISD 9th Supp. at p. 187 (1961).

[105] GATT--ANTI-DUMPING AND COUNTERVAILING DUTIES Sales No.: GATT/1961-2 at p. 20.

[106] See, the reprint in Hearings on H. R. 5505 Before Senate Committee on Finance, 82nd Congress, 2nd Session 2 (1961).

Similarly, Article 96 of the Treaty of Rome provides: "Products exported to the territory of any Member State may not benefit from any drawback of internal charges in excess of those charges imposed . . . on them."[107] Again, the expression "imposed on" is undoubtedly being used synonymously with "borne by".

Border tax adjustments usually take the form of remissions of indirect taxes or drawbacks of custom duties, granted upon exportation. The rationale for this is based on the assumption that indirect taxes, such as excise taxes, customs duties and turnover taxes will be passed on to the consumer in marking the price of the product, thereby the seller in fact automatically raises the price of his product by the amount of the indirect tax, making the purchaser pay the indirect tax. It is believed that to permit indirect taxes upon exportation, the consumer in the importing country now being the taxpayer (receiving no benefit for it), is treated inequitably. Tax theorists generally agree that it is preferable for taxes ultimately paid by consumers to be paid in the country of consumption (destination principle) rather than in the country of production (origin principle), so that the de facto taxpayers can receive the benefits of their taxes.[108] However, the present fiscal systems in Western Europe rely heavily on turnover taxes and the like, while in the United States income tax is primarily used (direct tax). For these reasons, many hold the view that the present trade rules applicable to border tax adjustments fall short of being fair and equitable, since they permit countries to remit indirect taxes on goods exported while denying countries that apply direct taxes from granting any concessions on exports.

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[107] 298 UNTS 53.

[108] Dam GATT at pp. 214-215.

The General Agreement regulates in some detail import restrictions relating to balance of payments deficits (in Articles XII and XVIII). However, there are no rules regulating export restrictions dealing with balance of payments surplus. As a result in 1969 Germany voluntarily levied a 4 per cent export tax because of its surplus to adjust its balance of payments.[109]

Despite the calls for the expansion of the rules to cover exports,[110] it is clear that export restrictions pertaining to raw materials utilized for the development of domestic processing industries in the developing countries, and the tendency of the raw material exporting countries to levy high export duties on raw materials and no export duties on manufactured or semi-manufactured products, are unlikely to become subject to multilateral negotiations, unless the outcome results in preference being given to the exports of manufactured and semi-manufactured products from the developing countries without reciprocity from them to the products of developed States.

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[109] International Monetary Fund, 21st ANNUAL REPORT ON EXCHANGE RESTRICTIONS at p. 192 (1970).
Also, see Jackson WORLD TRADE at pp. 294-313.

[110] Frieder Roessler _op. cit._ at p. 27.

CHAPTER VI

F. O. B. AND C. I. F.

FREE ON BOARD

1. GENERAL
2. NATURE OF F.O.B. CONTRACT
   2.1 *Variants of f.o.b. Contracts*
3. OBLIGATIONS
4. PASSING OF PROPERTY

COST, INSURANCE AND FREIGHT

1. ESSENTIAL CHARACTERISTICS
2. OBLIGATIONS
3. ESSENCE OF C.I.F. CONTRACT
4. PASSING OF PROPERTY

Overview

This chapter is concerned with certain customary trade terms such as f.o.b. (free on board) and c.i.f. (cost, insurance and freight). The law applicable to them is briefly traced within the Anglo-American common law system.

The f.o.b. and c.i.f. terms (as a legal term) used in international maritime commerce have been recognized for over a century. These particular terms were not a product of national legislation initially, but were evolved by usages and customs of merchants. Judicial contribution in this area was regarded to have been mainly by way of what was described as enforcement interpretation.

It is also clear that certain periods have witnessed an increase in the volume of f.o.b. trade and a decline in c.i.f. trade, while at other times the reverse was true. By the beginning of this century business transactions on c.i.f. terms far exceeded others. However, the First World War led to a scarcity in available shipping space and as sellers were reluctant to undertake the obligation of securing shipping space--in an uncertain market and at variable freight rates--as required under c.i.f. terms, this brought about an increase in the use of f.o.b. terms as compared to c.i.f. terms. During the twenties this shortage abated which resulted once again in the prominence of c.i.f. trade.

The Second World War changed the situation once again, and its aftermath, which saw the emergence of many new national shipping and insurance industries in a number of countries, along with a general shortage of foreign currency, played an influential role in the continued use of f.o.b. contracts. The creation of national and shipping industries meant that buyers in those countries were encouraged to use f.o.b. terms. For some developing countries the use of f.o.b. contracts permitted the preservation of scarce foreign exchange reserves, besides supporting fledgling domestic shipping and insurance industries.

It is believed by some that the advent of containerization may have an important effect upon the practical significance of f.o.b. contracts. As far as the development of the law in this area was concerned, international action was mainly provided by the International Chamber of Commerce. INCOTERMS 1953 attempted to provide some uniformity in this area.

In international trade, more particularly in maritime sales,[1] the contracts made usually embody certain customary trade terms. Since these particular terms have been developed historically mainly within the Anglo-American common law system, it will therefore be necessary for us to trace the developments in these areas to the laws of those countries.

FREE ON BOARD (f.o.b.)

1. GENERAL

The f.o.b. terms as a legal term of international commerce was found in 1812[2] in the first reported British decision of Wackerbarth v. Masson.[3] It is believed that in the contract for the sale of goods, f.o.b. "had probably been current in the trade for some time"[4] prior to 1812. Originally as stated by Lord Brougham in CowasJee v. Thompson, the buyer in the f.o.b. contract was considered to be the shipper: "It is proved beyond all doubt, indeed it is not denied that when goods are sold in London 'free on board', the cost of shipping them falls on the seller--but the buyer is considered as the seller."[5] With the enactment of the Bills of Lading Act, 1855,[6] the indorsee had the right to sue on the contract of affreightment, whereas prior to that time no such right, at least in his own name, existed.

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[1] The f.o.b. term has also been used in air transport--Clive M. Schmitthoff THE EXPORT TRADE (hereinafter cited as Schmitthoff EXPORT) Fifth Edition at pp. 22-23 (1969); as well as in domestic and land transport--David M. Sassoon C.I.F. AND F.O.B. CONTRACTS British Shipping Laws Vol. 5 (hereinafter cited as Sassoon) at p. 289 (1968).

[2] Other early British reported decisions include: Craven v. Ryder (1816) 6 Taunt. 433; Ruck v. Hatfield (1822) 5 B. and Ald. 632; CowasJee v. Thompson (1845) 5 Moore P.C. 165; Brown v. Hare (1858) 27 L.J. Ex. 377; and Stock v. Inglis (1884) 12 Q.B.D. 564.

[3] (1812) 3 Camp. 270--Lord Ellenborough's judgment.

[4] David M. Sassoon "The Origin of F.O.B. and C.I.F. Terms and the Factors Influencing their Choice" 1967 Journal of Business Law 33

Two important British decisions in the nineteenth century involving f.o.b. contracts were Brown v. Hare and Stock v. Inglis. In Brown v. Hare,[7] the plaintiffs from Rotterdam sold to defendants in Bristol through the defendants' broker as their agent ten tons of best refined rape oil to be shipped f.o.b. Rotterdam in September, 1857. The plaintiffs wrote to the defendants' broker in April indicating that they had secured ten tons for them, deliverable in September; and the defendants replied requesting the goods be sent on the first vessel from Rotterdam. On September 7th, the plaintiffs wrote to the defendants' broker to inform the defendants (which the broker duly did) that five tons would be shipped on the following day, and on September 8th the plaintiffs enclosed in a letter to the defendants' broker the bill of lading, invoice and bill of exchange drawn on the defendants. The bill of lading had been made deliverable to the seller's "order or assigns", and this the plaintiffs endorsed to the defendants. This letter reached the broker on September 10th after business hours. On September 11th the broker sent the enclosed documents to the defendants, by this time the broker knew that the goods had been lost, but the defendants only heard two hours after receiving the documents. The defendants argued that they were not liable as the buyer to pay the price since the goods were not delivered f.o.b. as the contract had stipulated because the bill of lading had been made deliverable to the order of the seller, and further, the plaintiffs as the seller had had control of the oil and that the contract of carriage had been made with them and so the seller should bear the risk of the loss. Pollock C.B. in his judgment for the majority of the Court of Exchequer held that the meaning of the term "free on board" was that the property was to pass to the defendants when the goods were delivered on board and that the bill of lading was not issued by the seller in order to retain the property but simply to secure the payment of the price. This, in his view was not inconsistent with the f.o.b. term and so the Court of Exchequer found for the plaintiffs.

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[5] (1845) 5 Moore P.C. 165 at pp. 173-174.

[6] 18 and 19 Vict. c. 111.

[7] (1858) 27 L.J. Ex. 377.

In Stock v. Inglis[8] the plaintiff was in Bristol to whom the seller agreed to sell 200 tons sugar f.o.b. Hamburg. There was also a separate similar contract covering another buyer. Payment was to be in exchange for the bill of lading. To fulfill the contracts 400 tons of sugar were shipped. It was the custom of the sugar trade between the respective ports not to appropriate specific bags of sugar to any particular contract at the time of shipment. Prior to apportionment of the goods between the purchasers, the goods got lost. Subsequently, the goods were appropriated, the plaintiff paying the agreed price and obtaining the bill of lading. The defendant was an underwriter with whom the plaintiff had an open cover policy. The defendant argued that as the property had not passed to the plaintiff before the loss, since there had been no appropriation the plaintiff had no insurable interest in the goods on which he could base his claim. The Court of

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[8] (1884) 12 Q.B.D. 564.

Appeal held that even though no property in the goods had passed to the plaintiff prior to the loss, and even though the goods were not specific, the f.o.b. term on the contract meant that once the sugar was shipped the plaintiff was liable to pay the price against the bill of lading whether the sugar arrived or not. The Court of Appeal found for the plaintiff and this was upheld by the House of Lords.[9]

2. NATURE OF F.O.B. CONTRACT

The essence of a f.o.b. contract was described by Brett M.R. in Stock v. Inglis to the effect that

> . . . *if goods dealt with by the contract were specific goods, it is not denied but that the words 'free on board', according to the general understanding of merchants, would mean more than merely that the shipper was to put them on board at his expense; they would mean that he was to put them on board at his expense on account of the person for whom they were shipped; and in that case the goods so put on board under such a contract would be at the risk of the buyer whether they were lost or not on the voyage.*
>
> *Now that is the meaning of those words 'free on board' in a contract with regard to specific goods, and in that case the goods are at the purchaser's risk, even though the payment is not to be made on delivery of the goods on board, but at some other time, and although the bill of lading is sent forward by the seller with the documents attached, in order that the goods shall not be finally delivered to the purchaser until he has either accepted the bills or paid cash.*[10]

2.1 Variants of f.o.b. Contracts

It was not until the judgment of Devlin J. in Pyrene Co. Ltd.

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[9] (1885) 10 App. Cas. 263.

[10] (1884) 12 Q.B.D. at p. 573.

v. Scindia Navigation Co. Ltd.[11] that various kinds of f.o.b. contracts were given full judicial recognition. In that judgment Devlin J. classified f.o.b. contracts into three broad categories and described them as follows:

> *The f.o.b. contract has become a flexible instrument. In . . . the classic type . . . for example in Wimble Sons and Co. Ltd. v. Rosenberg Sons, the buyer's duty is to nominate the ship and the seller's to put the goods on board for account of the buyer and procure a bill of lading in terms usual in the trade. In such a case the seller is directly a party to the contract of carriage, at least until he takes out the bill of lading in the buyer's name. Probably the classic type is based on the assumption that the ship nominated will be willing to load any goods brought down to the berth or at least those of which she is notified. Under the present conditions, when space often has to be booked well in advance; the contract of carriage comes into existence at an earlier point of time. Sometimes the seller is asked to make the necessary arrangements and the contract may then provide for his taking the bill of lading in his own name, and obtaining payment against the transfer, as in a c.i.f. contract. Sometimes the buyer engages his own forwarding agent at the port of loading to book space and to procure the bill of lading; if freight has to be paid in advance this method may, be most convenient. In such a case, the seller discharges his duty by putting the goods on board, getting the mate's receipt, and handing it to the forwarding agent to enable him to obtain the bill of lading.*[12]

In N. V. Handel My J. Smits Import-Export v. English Exporters (London) Ltd. the sellers had agreed to secure shipping space for the cargo to be delivered by them f.o.b. Rotterdam. McNair J. held that the limited obligation of obtaining shipping space seemed to him

> *. . . to co-exist quite consistently with the contract being otherwise upon f.o.b. terms; the f.o.b. terms still remain effective and important for two purposes at least, namely, to specify the exact price and what is included in the price, namely, all charges up until free on board, and, secondly*

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[11] (1954) 2 Q.B. 402.

[12] Ibid., at p. 424.

> *those words are apt for determining the place and moment at which the property and risk passes; and there is nothing inconsistent in those provisions with the obligation to find shipping space which I have endeavoured to state.*[13]

Similarly, in Carlos Federspiel & Co., S.A. v. Charles Twigg & Co. Ltd. the seller had undertaken also to pay for the insurance and freight. Pearson J. held that in his view these c.i.f. features were not inconsistent with the f.o.b. term.[14]

3. OBLIGATIONS

David Sassoon maintains that from these British decisions one can establish two basic features of the f.o.b. term, "that (a) the seller must pay the cost and bear the responsibility of putting the goods 'free on board', namely, until the point of their passing the ship's rail and (b) that upon so doing delivery is complete and the risk of loss in the goods is there and then transferred to the buyer."[15] Following these basic features, David Sassoon has classified them as the "strict", the "additional services" and the "shipment to destination variants".[16] In the orthodox or strict f.o.b. contract, it is the duty of buyer to nominate the ship. Under this, the Institute of Export's definition[17] (as amended by Clive Schmitthoff[18]) of the f.o.b.

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[13] (1957) 1 Lloyd's Rep. 517 at p. 521.

[14] (1957) 1 Lloyd's Rep. 240.

[15] Sassoon at p. 295.

[16] Ibid., at p. 297.

[17] 14 EXPORT at pp. 211 et seq. (1951).

[18] Schmitthoff EXPORT at pp. 15-16.

term is as follows:

> *The charges and responsibilities falling on the seller are ---*
>
> 1. *To make available at the port of loading and to ship free on board goods answering in all respects the description in the contract of sale.*
>
> 2. *To pay all handling and transport charges in connection with the above operation.*
>
> 3. *In case of delivery of goods from bond or under drawback to complete declarations required by H.M. Customs and Excise.*
>
> 4. *To meet all charges arising in connection with the goods up to the time of their passing over the ship's rail.*
>
> 4A. *To comply with section 32(3) of the Sales of Goods Act 1893 which provies ---*
>
> *"Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit."*
>
> 4B. *The seller has the onus of passing Customs entry and bears the cost and charges for it.*[19]
>
> *The charges and responsibilities falling on the buyer are ---*
>
> 1. *To advise the seller in good time on what ship at the port of loading agreed in the contract the seller has to put the goods free on board.*
>
> 2. *To secure shipping space in the designated vessel.*
>
> 3. *To obtain an export licence where necessary.*[20]

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[19] Schmittoff maintains that the seller is not allowed to place the goods on board unless he passes Customs entry and this seems also to be the view of the Association of British Chambers of Commerce-- Schmittoff EXPORT at p. 15.

[20] In A.V. Pound & Cc. Ltd. v. M.V. Hardy & Co. Inc. (1956) A.C. 588, The contract did not state who was to obtain the export licence

[Continued on next page.]

> 4. *To designate an effective ship in time to enable the seller to deliver within the period in the contract.*
>
> 5. *To enter and declare the goods at Customs as provided in the Customs Act, and meet all charges arising from the making of such entry.*[21]
>
> 6. *To make entry and meet charges arising from the upkeep and conservancy of waterways used by the ship in her passage out of port, e.g., London port rates.*
>
> 7. *In the event of breakdown of his arrangement with the ship arrange for substitute vessel or vessels with the least possible delay, and pay all additional costs of transport, rent, and other charges incurred on account of substitution and/or transfer.*[22]

As for the "additional services" variant, David Sassoon[23] believes the allocation of responsibilities between the parties under the International Chamber of Commerce's "INCOTERMS 1953"[24] is closer to this type than to the other two.

> *The purpose of Incoterms is to provide a set of international rules for the interpretation of the*

[Continued from p.204.]
and the House of Lords held that in the circumstances of the case, as an inference the duty to obtain it fell on the sellers. Due to this decision, Schmitthoff holds that this clause should be omitted since "it can no longer be regarded as correct as a general proposition of law."--Schmitthoff EXPORT at p. 15.
But cf. Carver, who states that "the presumption appears to be that it lies on the buyer."--Carver's CARRIAGE BY SEA (hereinafter cited as Carver) British Shipping Laws Vol. 3 Twelfth Edition by Rauol Colinvaux Volume 2 at p. 909 (1971).

[21] This clause must be compared with the seller's clause 4B above, according to Schmitthoff this has to be omitted since it can no longer be upheld--Schmitthoff EXPORT at p. 15.

[22] Sassoon at pp. 298-299.

[23] Ibid., at p. 343.

[24] J. Bes CHARTERING AND SHIPPING TERMS Seventh Edition at p. 254 (1970).

> chief terms used in foreign trade contracts, for the optional use of business men who prefer the certainty of uniform international rules to the uncertainties of the varied interpretations of the same terms in different countries.[25]

Under INCOTERMS 1953

F.O.B. (free on board). . . . . (named port of shipment)

A. Seller must:

1. Supply the goods in conformity with the contract of sale, together with such evidence of conformity as may be required by the contract.
2. Deliver the goods on board the vessel named by the buyer, at the named port of shipment, in the manner customary at the port, at the date or within the period stipulated, and notify the buyer, without delay, that the goods have been delivered on board the vessel.
3. At his own risk and expense obtain any export licence or other governmental authorisation necessary for the export of the goods.
4. Subject to the provisions of articles B.3 and B.4 below, bear all the costs and risks of the goods until such time as they shall have effectively passed the ship's rail at the named port of shipment, including any taxes, fees or charges levied because of exportation, as well as the costs of any formalities which he shall have to fulfil in order to load the goods on board.
5. Provide at his own expense the customary packing of the goods, unless it is the custom of the trade to ship the goods unpacked.
6. Pay the costs of any checking operations (such as checking quality, measuring, weighing, counting) which shall be necessary for the purposes of delivering the goods.
7. Provide at his own expense the customary clean document in proof of delivery of the goods on board the named vessel.

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[25] *Idem*.

8. Provide the buyer, at the latter's request and expense (see B.6), with the certificate of origin.

9. Render the buyer, at the latter's request, risk and expense, every assistance in obtaining a bill of lading and any documents, other than that mentioned in the previous article, issued in the country of shipment and/or of origin and which the buyer may require for the importation of the goods into the country of destination (and, where necessary, for their passage in transit through another country).

B. Buyer must:

1. At his own expense, charter a vessel or reserve the necessary space on board a vessel and give the seller due notice of the name, loading berth of and delivery dates to the vessel.

2. Bear all the costs and risks of the goods from the time when they shall have effectively passed the ship's rail at the named port of shipment, and pay the price as provided in the contract.

3. Bear any additional costs incurred because the vessel named by him shall have failed to arrive on the stipulated date or by the end of the period specified, or shall be unable to take the goods or shall close for cargo earlier than the stipulated date or the end of period specified and all risks of the goods from the date of expiration of the period stipulated, provided, however, that the goods shall have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

4. Should he fail to name the vessel in time or, if he shall have reserved to himself a period within which to take delivery of the goods and/or the right to choose the port of shipment, should he fail to give detailed instructions in time, bear any additional costs incurred because of such failure, and all the risks of the goods from the date of expiration of the period stipulated for delivery, provided, however, that the goods shall have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

> 5. *Pay any costs and charges for obtaining a bill of lading if incurred under article A.9 above.*
>
> 6. *Pay all costs and charges incurred in obtaining the documents mentioned in articles A.8 and A.9 above, including the costs of certificate of origin and consular documents.*[26]

It is maintained that the "additional services" undertaken by the seller are done by him in his capacity as seller, i.e., as principal and not as an agent of the buyer.[27]

The wide-spread practice of contracting on f.o.b. "shipment to destination"[28] terms were concisely described by Bailache J. in D. H. Bain v. Field & Co. Fruit Merchants Ltd. that

> *This case shows, as all these cases do now, that as a matter of fact the practice in f.o.b. contracts for the sale of comparatively small parcels, as distinguished from cargoes, it is the universal practice now for the sellers at the port of shipment, when that port is abroad to busy themselves in securing the shipping space, and I am inclined to think that the Court, in holding the view that the duty is still on the buyer and that the seller is acting merely in a friendly way or as an agent of the buyer, is deciding in a manner not in accordance with the commercial practice or the views of commercial men. Some day I shall expect that point to be raised, but if it is one will have to have evidence of the universality of the practice. My own view is that the case of small parcels sold f.o.b. it is the duty of the seller to take the necessary steps to provide the shipping accommodation. That is contrary to what is always held in these Courts, and it will be interesting--if anybody*

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[26] Ibid., at pp. 259-261.

[27] Sassoon at p. 346.

[28] This must not be confused with f.o.b. "point of destination"--which is found in section 2-319(1)(b) of the Uniform Commercial Code--where the seller has to transport the goods at his expense and risk to the destination point. W. D. Hawkland A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE (hereinafter cited as Hawkland) Vol. 1 at p. 109 (1964).

> *has enterprise enough to raise the point--to know what view this Court will take of the matter.*[29]

It is believed that the law in this area is most uncertain.[30] As stated by Diplock J. in Ian Stach Ltd. v. Baker Bosley Ltd.

> *. . . it may be a matter of doubt as to whose was to be the responsibility for finding shipping space and for determining shipping port and shipping date. Prima facie, under an f.o.b. contract that is the duty and responsibility of the buyer; but there are probably as many exceptions to the rule as there are examples of it.*[31]

In the "shipment to destination" variant, David Sassoon suggests that all seller's services are on account and risk of the buyer and the seller is the agent of the buyer.[32]

In American practice the f.o.b. term was considered a general delivery term.[33] Thus, section 2-319 of the Uniform Commercial Code provides:

> *Unless otherwise agreed the term f.o.b. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which*
>
> *(a) When the term is f.o.b. the place of shipment, the seller, must, at that place ship the goods in the manner provided in this article (s. 2-504)*[34] *and bear the expense and risk of putting them into the possession of the carrier; or*

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[29] (1920) 3 Ll. L. Rep. 26 at p. 29.

[30] Sassoon at pp. 352-354.

[31] (1958) 2 Q.B. 130 at p. 138.

[32] Sassoon at p. 346.

[33] Schmitthoff EXPORT at p. 16.

[34] Hawkland Vol. 1 at pp. 103-104.

> (b) When the term is f.o.b. place of destination, the seller must at his own expense and risk transport the goods to that place, and there tender delivery of them in the manner provided in this article (s. 2-503);[35]
>
> (c) When under either (a) or (b) the term is also f.o.b. vessel (corresponding to our understanding of f.o.b.), car, or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is f.o.b. vessel the buyer must name the vessel, and in an appropriate case the seller must comply with the provision of this article on the form of the bill of lading (s. 2-323).[36]

Accordingly, under American law the f.o.b. term[37] establishes either a "shipping" or "destination" contract, depending on the f.o.b. point. The f.o.b. point is determinative because it signifies the place at which the seller's responsibilities end.[38] As for the question of the termination of the seller's delivery obligation, the seller in a f.o.b. "place of shipment" contract must put the goods into the possession of the carrier. The usage of the trade will normally indicate how the seller puts the carrier into possession. In a f.o.b. "place of destination" contract, the seller must transport the goods to that place. The expression "that place" will normally be decided by the usage of the trade. In a f.o.b. vessel contract the seller must load the goods on board the particular vessel. The Uniform Commercial Code in section 2-319 makes the f.o.b. point the place for the transfer of risk as well as expense.

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[35] Ibid., at pp. 182-184.

[36] Ibid., at pp. 109-110.

[37] Schmitthoff maintains that the American "f.o.b. vessel" is equivalent to the English meaning of "f.o.b."--Schmitthoff EXPORT at p. 16.

[38] Hawkland Vol. 1 at p. 109.

David Sassoon maintains that the necessary distinguishing features between a f.o.b. contract and any other similar shipping contract is the capacity in which the seller acts while procuring the shipping space and prepaying freight and insurance.[39] But it should be pointed out that this distinction has not always been observed by the courts.[40] Further in some cases the f.o.b. term has been a "price" term and not a "delivery" term.[41] Also, the passing of property and of risk in f.o.b. contracts have in the past caused some difficulty. In the performance of a typical f.o.b. contract of sale, the disposal of goods is usually done in three stages: the delivery of the goods,[42] the passing of property in them;[43] and the passing of risk.[44] Generally in a f.o.b. contract the cost of loading the goods on board is paid by the seller (normally this cost is included in the freight which is paid by the buyer and so the seller in reality does not pay this amount but for the purposes of liability till the goods are delivered on board, his is still the obligation).

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[39] Sassoon at p. 345.

[40] The Mahia (No. 2) (1960) 1 Lloyd's Rep. 191 at p. 197.

[41] "The special trade terms are primarily designed to define the method of the delivery of the goods sold. They are, however, often used for another purpose, namely to indicate the calculation of the purchase price."--Schmitthoff EXPORT at p. 9. But cf. ". . . the terms are not the product of legislation but are rather the outgrowth of the customs and usages of merchants to whose evolution the courts have contributed mainly by way of enforcement . . . e.g., by rejecting the notion that they are price and not delivery terms . . . the courts have refined and defined the terms, their positive contribution to their evolution was mainly by way of what may be described as enforcement interpretation."--Sassoon "The Origins . . ." op. cit. at p. 33.
Also, see Hawkland Vol. 1 at p. 110.

[42] "delivery" is defined as the voluntary transfer of possession from one person to another"--section 62 of the English Sale of Goods Act, 1893--Schmitthoff EXPORT at p. 67.

[43] Under section 16(1) of the English Sale of Goods Act, 1893 where the contract is for sale of unascertained goods, the property does not pass until the goods are ascertained; and section 17(1) of the same Act provides that where the contract is for the sale of specific or ascertained goods, the property passes when the parties intend it to pass.--Schmitthoff EXPORT at p. 68.

4. PASSING OF PROPERTY

The risk pertaining to the consignment passes from the seller to the buyer when the cargo is shipped; normally this is when the goods are delivered over the ship's rail.[45] The property in the goods similarly passes at that moment, unless for some reason this is postponed by express or implied stipulation.[46] Also, whether the seller reserves the property in the goods until payment or not, the risk passes on shipment.[47] But it is possible under a f.o.b. contract to postpone the passing of property and of risk till after shipment.[48]

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[44] Under section 40 of the English Sale of Goods Act, 1893 the risk of accidental loss of goods sold passes prima facie when the property passes. But cf. section 2-509 of the Uniform Commercial Code and Article 97 of the Uniform Law on the International Sale of Goods, which provides that, as a rule, the risk shall pass on delivery of the goods.--Schmitthoff EXPORT at p. 70.

[45] Federspiel v. Twigg (1957) 1 Lloyd's Rep. 240. Also, ECE's General Conditions for Sale of Citrus Fruits provides that risk passes when they are delivered over the ship's rail.-- U.N. Doc. No. 58, II/E Mim. 12, cl. 8.2.(b).

[46] Schmitthoff EXPORT at p. 66.

[47] The Parchim (1918) A.C. 157.

[48] President of India v. Metcalfe Shipping Co. (1969) 2 Q.B. 123-- the parties agreed that the risk in the goods was not to pass until the delivery of the bills of lading to the purchasers. The Court held that this was an important indication that the property was not intended to pass until delivery of the bills of lading to the purchasers.

Carver maintains that the presumption should be that property passes when the goods are delivered over the ship's rail in all f.o.b. contracts.[49] On the other hand, David Sassoonargues that

> . . . *since the question of transfer of property is always subordinated to the intention of the parties, which is a question of fact, the view that the f.o.b. term in itself furnishes conclusive evidence as to such*

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[49] Carver Vol. 2 at pp. 905-906.
The U.C.C. in section 2-431 provides:

> "Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to goods except where the provision refers to such title. Insofar as situations are not covered by other provisions of this Article and matters concerning title become material the following rules apply:
>
> (1) Title to goods cannot pass under or contract for sale prior to their identification to the contract (section 2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this Act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and provisions of the Article on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.
>
> (2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading.
>
> (a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

[Continued on next page.]

> *intention, because it is one of the very elements of the transaction that the seller undertakes an irrecoverable obligation to transfer the property in the goods at the f.o.b. point come what may, is, with all respect, open to some question.*[50]

Clive Schmitthoff's position is that section 19 (2) of the English Sales of Goods Act, 1893, dealing with the seller reserving the property in the goods, does apply to f.o.b. contracts.[51]

As for the position under American law, the Uniform Commercial Code in section 2-401 (2) provides

> *Unless otherwise explicitly agreed, title passes to the buyer at the time and place where the seller completes his performance with respect to the physical delivery of the goods despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place and in particular despite any reservation of a security interest in the bill of lading.*[52]

In German law, the risk passes to the buyer in a f.o.b. contract when the goods are delivered to the ship.[53]

David Sassoon is of the opinion that the notion of "property" in relation to international sales is outmoded and that the current trend in the wide-spread use of financing by means of documentary letters of credit has also brought about the loss of much of its significance.[54]

[Continued from p. 213.]
(b) if the contract requires delivery at destination, title possession extends there. . . ."

--Hawkland Vol. 1 at p. 144.

[50] Sassoon at p. 362.

[51] Schmitthoff EXPORT at pp. 68-69.

[52] Hawkland Vol. 1 at p. 144.

[53] Cohn MANUAL OF GERMAN LAW Second Edition, Vol.I at para. 254-(c)(1968).

[54] Sassoon at pp. 362-364.

Further, he maintains that the concept of "property" must not be allowed to lead one to the conclusion that the risk of loss has not been transferred or that the buyer has no remedy if the seller withdraws and resells the goods to another party.[55] But, Mirabita v. Imperial Ottoman Bank[56] seems to establish an opposite principle to that advocated by David Sassoon.

Also, it is clear that in international maritime transport, the operation undertaken usually consists of three phases: on carriage of the goods to the port of dispatch; the transport by sea to the port of disembarkation; and off carriage to the final place of arrival. The advent of containerization, it is argued by Clive Schmitthoff, may have an important effect in the practical significance of the f.o.b. contract.[57] Since the Second World War the factor that has markedly influenced the use of the f.o.b. term has been

> *. . . the development and establishment of many new national shipping and insurance industries and the general scarcity of foreign exchange. In order to preserve foreign currency or support domestic industries, governments have often restricted the allocation of foreign currency to the f.o.b. value of the goods at the foreign port of embarkation compelling the importer to procure carriage and insurance in the local market in domestic currency.*[58]

This position still holds good for most of the developing countries that have been fortunate enough to have "infant" national shipping and insurance industries. It is our view that (unless the new rules now being adopted applicable to container combined transport are made favorable to the interests of the developing countries[59]) for most of those developing countries with fledgling shipping industries and other developing countries the scarcity of foreign exchange will still be of paramount importance in the conduct of their import trade and the conservation of scarce foreign exchange will dictate what types of contractual terms will be utilized by them in the future.

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[55] Ibid., at p. 362

[56] (1878) 3 Ex. D. 164.

[57] Schmitthoff EXPORT at p. 319.

[58] Sassoon at p. 291.

For those using f.o.b. terms,

> *. . . misunderstandings are best eliminated by incorporating into the contract a set of established standard rules wherein the respective obligations of the f.o.b. parties are defined in detail. Where the parties fail to express the intention, it will have to be imputed. The contract will then be read by the court in the light of surrounding circumstances and effort will be made to extract the parties' intention therefrom. The significant factors to be considered in such a case are the nature of the transaction (i.e., internal or external), the terms of payment, any established course of dealing between the parties, and the relevant port usages and trade customs.*[60]

To this we would add one caveat, that is as far as the developing country importer-exporter is concerned he will have to adapt the established standard rules to suit his peculiar needs. To that end the developing countries need to amend the set of established standard rules called INCOTERMS 1953 that are most frequently used in international maritime sales.

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[59] CMI Draft Convention on International Combined Transport of Goods (Tokyo Rules)--3 Journal of Maritime Law and Commerce 617 (1972).

[60] David M. Sassoon C.I.F. AND F.O.B. CONTRACTS, British Shipping Laws, Volume 5, Second Edition at p. 361 (1975).

4. COST, INSURANCE, AND FREIGHT (c.i.f.)

The f.o.b. contract, it is maintained, antedates the c.i.f. contract.[61] The c.i.f. term evolved with the expansion of international trade in the nineteenth century and in one of the first reported English case, Ireland v. Livingston,[62] in fact the initials were spelled "c.f. and i." In Ross T. Smyth & Co. Ltd. v. T. B. Bailey, Son & Co., Lord Wright described that the c.i.f. "is a type of contract which is more widely and more frequently in use than any other contract used for purposes of seaborne commerce. An enormous number of transactions, in value amounting to untold sums, is carried out every year under c.i.f. contracts."[63]

1. ESSENTIAL CHARACTERISTICS

In Biddell Brothers v. E. Clemens Horst Company, Hamilton J. outlined the obligations of the parties that

> *A seller under a contract of sale containing such terms has firstly to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly to make out an invoice as described by Blackburn J. in Ireland v. Livingston or in similar form; and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their*

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[61] Ibid., at pp. 289-290.

[62] (1871) L.R. 5 H.L. 395.
Tregelles v. Sewell (1862) T.H. and N. 574 was another early case.

[63] (1960) 3 All E.R. 60 at p. 68.

> loss if they are lost on the voyage. Such terms constitute an agreement that the delivery of the goods, provided they are on conformity with the contract, shall be delivery on board ship at the port of shipment. It follows that against tender of these documents, the bill of lading, invoice, and policy of insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price.[64]

The House of Lords in *Johnson* v. *Taylor Bros.* summarized the authorities as establishing clearly that

> . . . when a vendor and purchaser of goods situated as they are in this case enter into a c.i.f. contract, such as that entered into in the present case, the vendor in the absence of any special provision to the contrary is bound by his contract to do six things. First, to make out an invoice of the goods sold. Second, to ship at the port of shipment goods of the description contained in the contract. Third, to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract. Fourth, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer. Fifthly, with all reasonable despatch to send forward and tender to the buyer these shipping documents, namely, the invoice, bill of lading and policy of assurance, delivery of which to the buyer is symbolical of delivery of the goods purchased, placing the same at the buyer's risk and entitling the seller to payment of their price. These authorities are, *Ireland* v. *Livingston*, per Blackburn J.; *Biddell Bros.* v. *E. Clemens Horst Co.*; on appeal *E. Clemens Horst Co.* v. *Biddell Bros.*; and *C. Sharpe & Co.* v. *Nosawa Co.*[65] These cases also establish that if no place be named in the c.i.f. contract for the tender of the shipping documents they must *prima facie* be tendered at the residence or place of business of the buyer.[66]

The essential characteristics of the c.i.f. term were most clearly described in *Comptoir d'Achat* v. *Luis de Ridder Limitada (The Julia)* by Lord Porter that:

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[64] (1911) 1 K.B. 214.

[65] (1917) 2 K.B. 814.

[66] (1920) A.C. 144 (Lord Atkinson).

> *The obligations imposed on the seller under a c.i.f. contract are well known, and in the ordinary case include the tender of a bill of lading covering the goods contracted to be sold and no others, coupled with an insurance policy in the normal form and accompanied by an invoice which shows the price and, as in this case, usually contains a deduction of the freight which the buyer pays before delivery at the port of discharge. Against the tender of these documents the purchaser must pay the price. In such a case the property may pass either on shipment or on tender, the risk generally passes on shipment or as from shipment, but possession does not pass until the documents which represent the goods are handed over in exchange for the price. In the result the buyer after the receipt of the documents can claim against the ship for the breach of the contract of carriage and against the underwriter for any loss covered by the policy. The strict c.i.f. contract may, however, be modified: a provision that a delivery order may be substituted for a bill of lading or a certificate of insurance for a policy would not, I think, make the contract concluded upon something other than c.i.f. terms, but in deciding whether it comes within that category or not all the permutations and combinations of provision and circumstance must be taken into consideration.*[67]

It is clear from the foregoing that the c.i.f. transaction embodies elements of three contracts: contract of sale; contract of carriage by sea; and contract of insurance and these have caused complications in the past. It is maintained that the

> *. . . buyer's aim is to obtain, as early as possible, the right of disposal of the goods in order to resell them or secure a bank advance on them, and to obtain either the goods or, if they are lost, the insurance money. The seller's aim is to accommodate the buyer and to secure for himself increased profits by providing carriage and insurance cover, to part with the right of disposal of the goods only against payment of the purchase price and not to be answerable for loss or damage to the goods during the voyage.*[68]

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[67] (1949) A.C. 293 at p. 309.

[68] Schmitthoff EXPORT at p. 21.

2. OBLIGATIONS

As for American practice the Uniform Commercial Code in section 2-320 provides:

> (1) *The term c.i.f. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. . . .*
>
> (2) *Unless otherwise agreed and even though used only in connection with the stated price and destination, the term c.i.f. destination or its equivalent requires the seller at his own expense and risk to*
>
> (a) *put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and*
>
> (b) *load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and*
>
> (c) *obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and.*
>
> (d) *prepare an invoice of the goods and procure any other documents required to the effect shipment or to comply with the contract; and*
>
> (e) *forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer's right.*
>
> . . . . .
>
> (4) *Under the term c.i.f. . . . unless otherwise agreed the buyer must make payment against tender of the*

> *required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.*[69]

The Uniform Commercial Code also provides in section 2-321 that:

> *Under a contract containing a term c.i.f. . . .*
>
> *(1) Where the price is based on or is to be adjusted according to 'net landed weights', 'delivered weights', 'out turn' quantity or quality or the like, unless otherwise agreed the seller must reasonably estimate the price. The payment due on tender of documents called for by the contract is the amount so estimated, but after final adjustment of the price a settlement must be made with commercial promptness.*
>
> *(2) An agreement described in subsection (1) or any warranty of quality or condition of the goods on arrival place upon the seller the risk of ordinary deterioration, shrinkage and the like in transportation but has no effect on the place or time of identification to the contract for the sale or delivery or on the passing of the risk of loss.*
>
> *(3) Unless otherwise agreed where the contract provides for payment on or after arrival of the goods the seller must before payment allow such preliminary inspection as is feasible; but if the goods are lost delivery of the documents and payment are due when the goods have arrived.*[70]

As for the type of bill of lading required, the Uniform Commercial Code in section 2-323 provides that:

> *(1) Where the contract contemplates overseas shipment and contains a term c.i.f. . . . or f.o.b. vessel, the seller unless otherwise agreed must obtain a negotiable bill of lading stating that the goods have been loaded on board or, in the case of a term c.i.f. . . . received for shipment.*
>
> *(2) Where in a case within subsection (1) a bill of lading has been issued in a set of parts, unless otherwise agreed if the documents are not to be sent from abroad the buyer may demand tender*

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[69] Hawkland Vol. 1 at pp. 113-114.

[70] Ibid., at pp. 119-120.

> *of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set*
>
> *(a) due tender of a single part is acceptable within the provisions of this Article on cure of improper delivery (subsection (1) of Section 2-508); and*
>
> *(b) even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may nevertheless require payment upon furnishing an indemnity which the buyer in good faith deems adequate.*
>
> *(3) A Shipment by water or by air or a contract contemplating such shipment is "overseas" insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep water commerce.*[71]

Clive Schmitthoff maintains that even if the parties describe the contract on c.i.f. terms but should the intention of the parties be the actual delivery of the goods as an essential condition of performance of the contract, it is not a c.i.f. contract. Also, "if on transfer of the shipping documents no direct relation is constituted between the transferee, on the one hand, and the carrier and insurer, on the other, the contract lacks the essential legal features of a c.i.f. contract."[72]

Under INCOTERMS 1953 the respective obligations of the parties are outlined as follows:

> *C.I.F. (cost, insurance, freight) . . . . . (named port of destination)*
>
> *A. Seller must:*
>
> *1. Supply the goods in conformity with the contract*

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[71] Ibid., at pp. 120-121.

[72] Schmitthoff EXPORT at p. 33.

of sale, together with such evidence of conformity as may be required by the contract.

2. Contract on usual terms at his own expense for the carriage of goods to the agreed port of destination by the usual route, in a seagoing vessel (not being a sailing vessel) of the type normally used for the transport of goods of the contract description, and pay freight charges and any charges for unloading at the port of discharge which may be levied by regular shipping lines at the time and port of shipment.

3. At his own risk and expense obtain any export licence or other governmental authorisation necessary for the export of the goods.

4. Load the goods at his own expense on board the vessel at the port of shipment and at the date or within the period fixed or, if neither date nor time have been stipulated, within a reasonable time, and notify the buyer, without delay, that the goods have been loaded on board the vessel.

5. Procure, at his own cost and in a transferable form, a policy of marine insurance against the risks of the carriage involved in the contract. The insurance shall be contracted with the underwriters or insurance companies of good repute on FPA terms and shall cover the CIF price plus ten per cent. The insurance shall be provided in the currency of the contract, if procurable.

   Unless otherwise agreed, the risks of carriage shall not include special risks that are covered in specific trades or against which the buyer may wish individual protection. Among the special risks that should be considered and agreed upon between the seller and buyer are theft, pilferage, leakage, breakage, chipping, sweat, contact with other cargoes and others peculiar to any particular trade.

   When required by the buyer, the seller shall provide, at the buyer's expense, war risk insurance in the currency of the contract, if procurable.

6. Subject to the provisions of article B.4 below, bear all risks of the goods until such time as they shall have effectively passed the ship's rail at the port of shipment.

7. At his own expense, furnish to the buyer without delay a clean negotiable bill of lading for the agreed port of destination, as well as the invoice of the goods shipped and the insurance policy or, should the insurance policy not be available at the time the documents are tendered, a certificate of insurance issued under the authority of the underwriters and conveying to the bearer the same rights as if he were in possession of the policy and reproducing the essential provisions thereof. The bill of lading must cover the contract goods, be dated within the period agreed for shipment, and provide by endorsement or otherwise for delivery to the order of the buyer or buyer's agreed representative. Such bill of lading must be a full set of "on board" or "shipped" bills of lading, or a "received for shipment" bill of lading duly endorsed by the shipping company to the effect that the goods are on board, such endorsement to be dated within the period agreed for shipment. If the bill of lading contains a reference to the charter-party, the seller must also provide a copy of this latter document.

   NOTE: A clean bill of lading is one which bears no superimposed clauses expressly declaring a defective condition of the goods or packaging.

   The following clauses do not convert a clean into an unclean bill of lading: a) clauses which do not expressly state that the goods or packaging are unsatisfactory, e.g., "second-hand cases", "used drums", etc.; b) clauses which emphasize the carrier's non-liability for risks arising through the nature of the goods or the packaging; c) clauses which disclaim on the part of the carrier knowledge of contents, weight, measurement, quality, or technical specification of the goods.

8. Provide at his own expense the customary packing of the goods, unless it is the custom of the trade to ship the goods unpacked.

9. Pay the costs of any checking operation (such as checking quality, measuring, weighing, counting) which shall be necessary for the purpose of loading the goods.

10. Pay any dues and taxes incurred in respect of the goods up to the time of their loading, including any taxes, fees or charges levied because of

exportation, as well as the costs of any formalities which he shall have to fulfil in order to load the goods on board.

11. Provide the buyer, at the latter's request and expense (see B.5), with the certificate of origin and consular invoice.

12. Render the buyer, at the latter's request, risk and expense, every assistance in obtaining any documents, other than those mentioned in the previous article, issued in the country of shipment and/or of origin and which the buyer may require for the importation of the goods into the country of destination (and, where necessary, for their passage in transit through another country).

B. Buyer must:

1. Accept the documents when tendered by the seller, if they are in conformity with the contract of sale, and pay the price as provided in the contract.

2. Receive the goods at the agreed port of destination and bear, with the exception of the freight and marine insurance, all costs and charges incurred in respect of the goods in the course of their transit by sea until their arrival at the port of destination as well as unloading costs, including lighterage and wharfage charges, unless such costs and charges shall have been included in the freight or collected by the steamship company at the time freight was paid.

   If war insurance is provided, it shall be at the expense of the buyer (see A.5).

   NOTE: If the goods are sold "CIF landed", unloading costs, including lighterage and wharfage charges, are borne by the seller.

3. Bear all risks of the goods from the time when they shall have effectively passed the ship's rail at the port of shipment.

4. In case he may have reserved to himself a period within which to have the goods shipped and/or the right to choose the port of destination, and he fails to give instructions in time, bear the additional costs thereby incurred and all risks of the goods from the date of the expiration of the period fixed for shipment, provided always that the goods shall have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

5. *Pay the cost and charges incurred in obtaining the certificate of origin and consular documents.*

6. *Pay all cost and charges incurred in obtaining the documents mentioned in article A.12 above.*

7. *Pay all custom duties as well as any other duties and taxes payable at the time of or by reason of the importation.*

8. *Procure and provide at his own risk and expense any import licence or permit or the like which he may require for the importation of the goods at destination.*[73]

3. ESSENCE OF C.I.F. CONTRACT

The business aspect of the c.i.f. contract has been described as having for its purpose, "not a sale of goods themselves but a sale of the documents relating to the goods."[74] The right to reject the documents in a c.i.f. contract is distinct from the right to reject the goods. In Kwei Tek Chao v. British Traders and Shippers Ltd., Devlin J. indicated that "the right to reject the document arises from when the documents are tendered, and the right to reject the goods arises when they are landed and when after examination they are not found to be in conformity with the contract."[75] In this case, the contract called for the export by London merchants of a quantity of chemicals to a Hong Kong importer c.i.f. Hong Kong, shipment from continental port not later than October 31, 1951. Unknown to the sellers, the consignment was shipped from Antwerp on November 3, 1951 but the bill of lading was forged and showed shipment date as October 31, 1951. The buyers, unaware of this, accepted the documents and pledged them with their bank. Before the arrival of the goods, the buyers discovered what had transpired, but they still took delivery of the goods and placed them in a warehouse and pledged the warehouseman's receipt to the bank as security. Devlin J. observed that under a c.i.f. contract the seller was under two distinct and separate obligations--the obligation to tender the correct documents; and the obligation to tender the contract goods. In his view the buyer's act of merely dealing with the documents was not inconsistent with the seller's ownership in the goods, and the buyer retained the right to reject the goods after examination on their arrival. Devlin J. held:

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[73] J. Bes op. cit., at pp. 264-267.

[74] Schmitthoff EXPORT at p. 23.

[75] (1954) 2 Q.B. 459 at p. 481.

> I think that the true view is that what the buyer obtains when the title under the documents is given to him, is the property in goods, subject to the condition that they revest if upon examination he finds them to be not in accordance with the contract. That means that he gets only conditional property in the goods, the condition being a condition subsequent. All his dealings with the documents are dealings only with that conditional property in the goods. It follows, therefore, that there can be no dealing which is inconsistent with the seller's ownership unless he deals with something more than conditional property. . . .
>
> So long as he is merely dealing with the documents he is not purporting to do anything more than pledge the conditional property which he has. Similarly, if he sells the documents of title, he sells the conditional property.[76]

4. PASSING OF PROPERTY

It follows from the foregoing that in a c.i.f. contract, the property in the goods does not normally pass on shipment. On the other hand, in such a contract, risk passes normally when the goods are delivered over the ship's rail.[77] Also, the c.i.f. buyer is under an obligation to accept the shipping documents and pay the price even when he has knowledge that the goods were lost in transit.[78] The buyer's remedy in such a situation is to claim against the carrier by reason of the bill of lading or against the insurer by virtue of the marine insurance policy. In German law the risk in the goods in a c.i.f. contract passes when they are delivered to the ship.[79] The Economic Commission for Europe's (ECE) General Conditions for the sale of citrus fruits provides that the risk in the goods in a c.i.f. contract passes when they are delivered over the ship's rail.[80] It should also be mentioned that customary trade terms are not defined in the 1964 Hague Convention on the Uniform Law on International Sale of Goods (ULIS) and in fact Article 9 states that these take precedence over the provisions of ULIS. Article 9 provides:

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[76] Ibid., at p. 487.

> (1) *The parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices which have been established between themselves.*
>
> (2) *They shall also be bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract. In the event of conflict with the present Law, the*

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[77] Sassoon at p. 173.

[78] Manbre, Saccharine Co. v. Corn Products Co. (1919) 1 K.B. 198 at p. 204 (per MacCardie J.).

[79] Cohn op. cit., at para. 256(c)

[80] U.N. Doc. No. 58, op. cit.

> *usages shall prevail unless otherwise agreed by the parties.*
>
> (3) *Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned.*[81]

In light of this, the provision relating to risk in Article 19 (which in fact states that "where the contract of sale involves carriage of the goods and no other place for delivery has been agreed upon, delivery shall be effected by handing over the goods to the carrier for transmission to the buyer")[82]--that is, risk passes when goods are transferred to the carrier for transmission by ship--would be subject to the provision of Article 9 in a c.i.f. foreign port transaction.

Further, it is maintained by Frederic Eisemann that INCOTERMS 1953, being rules of uniform interpretation (given in eighteen countries) correspond in fact to the rules developed in actual practice, were not artifically created and accurately reflect business practice. He also argues that the varied proportions in which the main categories of liability are shared between the buyer and the seller bear direct relation to market conditions.[83] It is in this way that "ready-made" contractual clauses have been developed for general use in the international sale of goods. As for the legal nature of these rules, Frederic Eisemann concedes that neither are they statutory nor do they govern all international contracts, since the parties have expressly to stipulate their application. However, he feels that they "may have binding force as some sort of lex mercatoria or commercial customary law."[84] Since they reflect international business practice and they may be regarded as one of the new sources of the law of international trade.[85]

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[81] Register of Texts Vol. 1 op. cit. at pp. 44-45.

[82] Ibid., at p. 46.

[83] Frederic Eisemann "ICC's Stake in the Law of International Trade" 2 J.W.T.L. 1 at pp. 12-13 (1968).

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[84] Frederic Eisemann "Incoterms and the British Export Trade" 1965 Journal of Business Law 114 at p. 119.

[85] ". . . commercial practices, usages or standards which are so widely used that businessmen engaged in international trade expect their contracting parties to conform with them and which are formulated by international agencies."--Schmitthoff SOURCES at p. 16.

CHAPTER VII

COMMERCIAL LETTERS OF CREDIT

1. *BACKGROUND*
2. *MODERN CREDITS*
3. *VARIOUS THEORIES*
4. *CLASSIFICATIONS*
   - 4.1 *Revocable or Irrevocable Credits*
   - 4.2 *Confirmed or Unconfirmed Credits*
5. *UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1962 REVISION)*
6. *EL NASR CASE*
7. *1974 UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS*

Overview

As for commercial letters of credit dealt with in this chapter, they have a very ancient heritage. This device of payment in international commerce was encumbered as far as the common law was concerned by the doctrine of consideration and the question of the assignability of choses in action. However, despite theoretical difficulties, pragmatic considerations permitted not only a widespread use of letters of credit but also led to its judicial enforcement. The ever-increasing demands of the business world for effective uniformity in banking practices related to commercial letters of credit influenced the adoption of the Uniform Customs and Practice for Documentary Credits--UCP "1974 Revision" under the aegis of the International Chamber of Commerce. The adherence by banks collectively in some 175 countries to the UCP can be said to have made some contribution towards the universality of bankers' commercial credits.

It is generally believed that the modern commercial letter of credit was well known by the second half of the nineteenth century. There are approximately a dozen or more theories explaining commercial letters of credit. Commercial credits have been classed as revocable or irrevocable credits; confirmed or unconfirmed credits; and transferable or non-transferable credits.

It should be pointed out that the UCP have been developed by the International Chamber of Commerce, a body mainly representing the developed nations and on which the developing and the centrally planned socialist countries are not adequately represented. Recently there has been some effort on the part of the International Chamber of Commerce to seek the views of the other countries through UNCITRAL. However, we need to emphasize the importance of considering the particular position of the developing countries in any further work on the UCP.

1. BACKGROUND

Among the great contributions made by the law merchant to the development of commercial law have been the bill of exchange, the promissory note and the letter of credit.[1] "That [letters of credit] are as ancient as bills of exchange, and were developed by the same class, the early merchants doing international trade, is well established."[2] During the fourteenth century, the bankers of the Italian city-states and other European commercial cities freely used the letter of credit and it had become clearly recognized in the law merchant long before Lord Mansfield's day.

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[1] Thayer "Irrevocable Credits in International Commerce: Their Legal Nature" 36 Columbia Law Review 1031 (1936).

[2] R.B.T. *Comments* "Letters of Credit--Negotiable Instruments" 36 Yale Law Journal 245 at pp. 248-249 (1926-27).

Gerard Malynes in his LEX MERCATORIA relates the use of the letter of credit by stating:

> *A merchant doth send his friend or servant to buy some commodities or take up money for some purpose, and doth deliver unto him an open letter directed to another merchant, requiring him that if his friend . . . the bearer of that letter have occasion to buy commodities or take up moneys that he will procure him the same and he will provide him the money or pay him by exchange.*[3]

A letter of credit under the law merchant was enforceable by the beneficiary of such a letter notwithstanding that no consideration passed between the beneficiary and the issuer. The common law doctrine of consideration, as well as the old common law rule that choses in action were not assignable initially impeded the use of letters of credit.[4]

During the early eighteenth century Lord Mansfield dealt with letters of credit in two celebrated cases of Pillans and Rose v. Van Mierop and Hopkins,[5] and Mason v. Hunt.[6] In Pillans v. Van Mierop, White, a merchant in Ireland, desired to draw a bill for acceptance by Pillans and Rose, the plaintiffs, in Rotterdam. In reply to this the plaintiffs required the credit to be confirmed by a reputable house in London as a condition for their acceptance of the bill. White named the defendants as the reputable house. The plaintiffs honoured White's draft and asked the defendants whether they would honour plaintiffs' bills to be drawn upon the credit of White. The defendants agreed to do so. Subsequently the plaintiffs drew on the defendants. In the meantime White became insolvent and the defendants gave notice to the plaintiffs and forbade them to draw upon them. The plaintiffs, nevertheless did so and the defendants refused to pay. In an action for breach of contract, the defendants pleaded that there was no consideration for their promise, such consideration as there was in fact being past consideration, since the plaintiffs had paid White before they even wrote to the defendants, much less before they received the defendants' promise. Lord Mansfield held

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[3] Gerard Malynes LEX MERCARTORIA at p. 76.

[4] Ames LECTURES ON LEGAL HISTORY at p. 210 (1913).

[5] (1765) 97 E.R. 1035.

[6] (1778) 99 E.R. 192.

> *This is just the same thing as if White had drawn on Van Mierop and Hopkins, payable to the plaintiffs; it had been nothing to the plaintiffs whether Van Mierop and Co. had effects of White's in their hands, or not: if they had accepted his bill. And this amounts to the same thing. "I will give the bill due honour", is, in effect, accepting it. . . . This is an engagement "to accept the bill", if there was a necessity to accept it; and to pay it when due": and they could not afterwards retract.*
>
> *. . . If there be no fraud, it is a mere question of law. The law of merchants, and the law of the land, is the same: a witness cannot be admitted, to prove the law of merchants. We must consider it a point of law. A nudum pactum does not exist, in the usage and law of merchants.*[7]

In *Mason* v. *Hunt*, Vance purchased a quantity of prize-tobacco as a merchant in Dominica for the purpose of shipping it and so required to draw the necessary bills of exchange. The defendants agreed that Vance could draw bills at a fixed price per hogshead of tobacco payable to himself on condition that the bills of lading relating to the shipment were also presented with the bills drawn. Vance drew bills and endorsed them to the plaintiff. The defendants refused to accept the bills when presented by the plaintiff as the tobacco was found to be much below the stipulated value. Lord Mansfield held

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[7] (1765) 97 E.R. at p. 1038.

> *If one man, to give credit to another, makes an absolute promise to accept his bill, the drawer or any other person may show such promise upon the exchange, to get credit. But (and on this point the defendants succeeded) an agreement to accept is still but an agreement, and if conditional and a third person takes the bill knowing of the conditions annexed to the agreement, he takes it subject to such conditions.*[8]

In the United States in Carnagie v. Morrison, Bradford, the buyer requested from his bank a letter of credit, promising to cover the drafts on maturity. In response the bank sent a letter to him addressed to the defendants, the drawee bank in London. Bradford sent this letter to the plaintiffs, the seller. Subsequently, the defendants drawee bank wrote to the plaintiffs that the credit could not be granted. The plaintiffs, nevertheless, drew the bill of exchange on the defendants. The defendants refused to pay and argued that there was only a contract between them and Bradford that the former would give him credit, so that the plaintiffs were not a party to this and could not sue on it. Shaw C.J. held

> *He (Bradford) had funds either in cash or credit with the defendants and entered into a contract with them to pay a sum of money for him to the plaintiffs. . . . He gave the plaintiffs notice of what he had done and sent them the instrument as authentic evidence of the fact. They assented to and affirmed it as an act done in their behalf and gave the defendants notice thereof and conformable to the terms of the letter of credit drew their bills on the letter of credit. The refusal to accept was a breach of the promise thus made. . . . It would be vain to say that this promise was not made*

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[8] (1778) 99 E.R. 192.

> *for the benefit or (according to the terms of some of the cases) for the interest of the plaintiffs.*[9]

In Russell v. Wiggin, the defendants through their agent in Boston issued, for the account of Breed, a letter of credit authorizing to draw on the defendants. Subsequently, Breed failed. The plaintiffs, relying on this letter had possession of certain drafts and sued the defendants on them. Story J. held

> *The second question is: Whether a promise, contained in a letter of credit, written by persons, who are to become the drawees of the bills drawn under it, promising to accept such bills when drawn, which letter, although addressed to the persons, who are to be the drawers of the bills, is designed to be shown to any and all person or persons whatsoever, to induce them to advance money on, and take the bills, when drawn, will be an available contract in favor of the persons, to whom the letter of credit is shown, who advance money and take the bills on the faith thereof, or is void for want of privity between them and the person writing the letter of credit. . . .*
>
> *The second question is one, upon which, until I heard the present argument, I did not suppose, that any real doubt could be raised, as to the law, either in England or America. . . .*
>
> *I have understood, and always supposed, that . . . the party giving such a letter, held himself out to all persons, who should advance money on bills drawn under the same, and upon the faith thereof, as contracting with them an obligation to accept and pay the bills.*[10]

In Comyn's DIGEST it is stated that

> *A bill of credit is, when a merchant sends a letter by a servant or agent to another merchant, within the realm, or in foreign parts, whereby he desires him to give credit to the bearer for goods or money, to such a value.*
>
> *So he may give a general letter of credit to all merchants or others, for all monies delivered to such*

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[9] (1841) 2 Met. (Mass.) 381.

[10] (1842) 21 Fed. Cas. 68, No. 12, 165.

> *a one, within such a time: and thereupon shall be liable for all monies advanced to such an agent.*[11]

Story defined a letter of credit as

> *. . . an open letter of request, whereby one person (usually a merchant or a banker) requests some other person or persons to advance moneys, or give credit, to a third person, named therein, for a certain amount, and promises that he will repay the same to the person advancing the same, or accept bills drawn upon himself, for the like amount. It is called a general letter of credit, when it is addressed to all merchants, or other persons in general, requesting such advance to a third person; and it is called a special letter of credit, when it is addressed to a particular person by name requesting him to make such advances to a third person.*[12]

Ellinger refers to Story's definition as relating to an open letter of credit or clear credit and distinguishes it with the modern documentary credit or commercial letter of credit.[13] Sometimes Story's type of letter of credit is referred to as a traveller's letter of credit.[14]

As far as Anglo-American common law is concerned the idea behind the letter of credit was received from the continent. It is stated that letters of credit were "an old institution of the continental commercial law, well understood as far back as the seventeenth century."[15] The continental writers dealt with what was described as the traveller's letters of credit. Omer Hershey believes that on the continent the development of documentary credits was based on a simple theory that a promise made in course of a commercial undertaking was binding. According to him, as far as the French law was concerned, there were two aspects to the letter of credit. As between the issuer of the letter and the applicant or correspondent, French law treated the letter as a species of mandate. As between the issuer of letter of credit and the holder or beneficiary, the transaction was treated as one of "opening of a credit". This latter concept was understood in continental banking as having been developed from the practice whereby the bank, did not make a loan (mutuum), but instead agreed to loan up to a certain amount within a certain time. This was described as a pactum de mutuo dando.[16] Gluck has described pactum de mutuo dando in the following way: "Most civilians are agreed that the bare agreement to make a loan to another binds the promisor and gives rise to an action against him. . . . For according to Roman law a stipulatio de mutuo dando has actionable obligation. But today a bare agreement is as efficacious as a Roman stipulation."[17] Accordingly, this promise to make a loan was held to create a binding transaction under continental law.

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[11] Comyn's DIGEST Fifth Edition Vol. V at p. 115 (1822).

[12] STORY ON BILLS at para. 459 (1860 edition).

[13] E. P. Ellinger DOCUMENTARY LETTERS OF CREDIT (hereinafter cited as Ellinger DOCUMENTARY CREDIT) at p. 5 (1970).

[14] A. G. Davis THE LAW RELATING TO COMMERCIAL LETTERS OF CREDIT. Third Edition at p. 1 (1963).

[15] Omer F. Hershey "Letters of Credit" 32 Harvard Law Review 1 at p. 4 (1918).

2. MODERN CREDITS

It is generally believed that the modern commercial letter of credit was well known by the second half of the nineteenth century.[18] In Morgan v. Lariviere, the French Government, as the buyer, requested a London bank to open a letter of credit in favour of a firm of arms manufacturers. The London bank wrote a letter of credit to the sellers indicating that a special credit for a certain sum had been opened in their favour, and that this sum would be paid rateably as the goods were delivered upon receipt of certificates of acceptance issued by the French Ambassador. Lord Chancellor Cairns described this document as follows:

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[16] Ibid., at pp. 5-6.

[17] Ibid., at p. 7.

> *Your Lordships are perfectly familiar with this, which occurs every day in commerce: a credit is opened with a particular house of business in favour of another house of business; generally a credit of that kind is, to use a mercantile phrase, 'operated upon' by bills of exchange being drawn upon the house which undertakes to give the credit; but a credit of that kind may be operated upon also by means of cheques, or it may be operated upon by simple demands, in any form, for the payment of the sum for which credit has been undertaken to be given.*[19]

3. VARIOUS THEORIES

As for the theoretical basis of the letter of credit, the decisions from the common law countries allowed for a number of explanations. Before we briefly enumerate the various theories, it may be useful to state what was involved in the business transaction using a letter of credit. In simple terms, in a contract of sale of goods, a term of the contract stipulates that payment is to be effected by means of a letter of credit. In compliance with this term, the buyer approaches a reputable bank requesting that they issue a letter of credit in favour of the sellers. The buyer's request to the bank is done by a letter of request containing the conditions for the letter of credit. This letter requests the opening of the credit and the advising of the seller either directly by the bank or by the bank's agent at the seller's place of business. The letter of credit issued as a result contains an undertaking by the bank to the seller to accept drafts drawn under the credit in compliance with its conditions, which usually relate to the documents to accompany the drafts.[20]

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[18] Ellinger DOCUMENTARY CREDIT at p. 32.

[19] (1875) L.R. 7 H.L. 424 at p. 432.

Ellinger has outlined various theories under the headings: classification solutions (eight theories);[21] contractual solutions (four theories);[22] and mercantile usage theory.[23] Ellinger argues that the banking practice of opening commercial letters of credit is uniform in the United States, Britain, France and Germany. "While there are certain differences in the words used in the banking forms of different bankers in different countries, the nature and effect of these instruments are essentially the same."[24] He also believes that the legal problems concerning documentary credits are solved in a uniform manner in all the above four jurisdictions.

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20 Ellinger DOCUMENTARY CREDIT at pp. 107-108.

21 Under classification solutions are listed: (1) anticipatory acceptance theory; (2) guarantee theory; (3) contract for the benefit of a third party theory; (4) assignment theory; (5) novation theory; (6) agency theories; (7) estoppel and trust theories; and (8) abstract promise solution (used in Germany)--ELLINGER DOCUMENTARY CREDIT at pp. 44-75.

22 Under contractual solutions are listed: (1) seller's offer theory; (2) Mead's theory [W. A. Mead "Documentary Letters of Credit" 22 Columbia Law Review 297 at pp. 302-305 (1922)]; (3) offer and acceptance theory; and (4) forbearance theory--Ellinger DOCUMENTARY CREDIT at pp. 76-104.

23 Ellinger DOCUMENTARY CREDIT at pp. 105-125.

24 Ibid., at pp. 121-122.

We do not intend to analyze the theoretical basis of commercial letters of credit since it would go beyond the scope of this study. Our concern is with documentary credits as a concept used as one method of payment in contracts involving international trade. It must be pointed out that the issue of a letter of credit now generally involves two transactions: the contract relating to sale, and the promise relating to the letter of credit. "The essential feature of a documentary credit is that the banker promises to place the seller in funds against the tender of certain documents of title."[25]

4. CLASSIFICATIONS

From a legal point of view commercial letters of credit have been classed as revocable or irrevocable credits, confirmed or unconfirmed credits,[26] and transferable credits.[27] The International Chamber of Commerce has codified widely accepted rules relating to documentary credits developed in banking usage, first at its Amsterdam Congress in 1929, revised again at its Vienna and Lisbon Congresses in 1933 and 1945 respectively and then the 1962 Revision[28] and recently the 1974 version.

4.1 Revocable or Irrevocable Credits

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[25] Ibid., at p. 15.

[26] Ibid., at pp.8-15.
Also, see Davis op. cit. at pp. 33-43; H. C. Gutteridge and M. Megrah THE LAW OF BANKERS' COMMERCIAL CREDITS Fourth Edition at pp. 9-11 (1968) and Boris Kozolchyk COMMERCIAL LETTERS OF CREDIT IN THE AMERICAS at pp. 20-21; 369-415; 461-463 (1966).

[27] Ellinger DOCUMENTARY CREDIT at pp. 17-20. Also, see Gutteridge and Megrah op. cit. at pp. 11-12 and Kozolchyk op. cit. at p. 28.

[28] Frederic Eisemann "ICC's Stake . . ." op. cit. at pp. 16-17.
Also, see Ellinger DOCUMENTARY CREDIT at p. 359 (UCP (1962 Revision)).

The Uniform Customs and Practice for Documentary Credits--UCP (1974 Revision[29]) [Appendix C] in Article 1 provides:

> a. *Credits may be either*
>
> *(i) revocable, or*
>
> *(ii) irrevocable.*
>
> b. *All credits, therefore, should clearly indicate whether they are revocable or irrevocable.*
>
> c. *In the absence of such indication the credit shall be deemed to be revocable.*[30]

In Article 2 of the 1974 UCP revocable credit is defined as:

> *A revocable credit may be amended or cancelled at any moment without prior notice to the beneficiary. However, the issuing bank is bound to reimburse a branch or other bank to which such a credit has been transmitted and made available for payment, acceptance or negotiation, for any payment, acceptance or negotiation complying with the terms and conditions of the credit and any amendments received up to the time of payment, acceptance or negotiation made by such branch or other bank prior to receipt by it of notice of amendment or of cancellation.*[31]

Article 3 of the 1974 UCP defines irrevocable credit as:

> a. *An irrevocable credit constitutes a definite undertaking of the issuing bank, provided that the terms and conditions of the credit are complied with:*

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[29] ICC Publication 290--1974 REVISION OF UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (hereinafter cited as 1974 UCP) effective October 1, 1975--76 Lloyd's Maritime Commercial Law Quarterly 15 at pp. 15-28.

[30] UCP 1974 at p. 16.
But cf. Article 1 of UCP (1962 Revision)--Ellinger DOCUMENTARY CREDIT at p. 360.

[31] UCP 1974 at p. 16.
But cf. Article 2, and also Article 38 of UCP (1962 Revision). Article 38--the validity of a revocable credit, if no date is stipulated will be considered to have expired 6 months from the date of the notification sent to the beneficiary by the bank with which the credit is available--Ellinger DOCUMENTARY CREDIT at pp. 362 and 367.

> (i) *to pay, or that payment will be made, if the credit provides for payment, whether against a draft or not;*
>
> (ii) *to accept drafts if the credit provides for acceptance by the issuing bank or to be responsible for their acceptance and payment at maturity if the credit provides for the acceptance of drafts drawn on the applicant for the credit or any other drawee specified in the credit;*
>
> (iii) *to purchase/negotiate, without recourse to drawers and/or* bona fide *holders, drafts drawn by the beneficiary, at sight or at a tenor, on the applicant for the credit or on any other dravee specified in the credit, or to provide for purchase/negotiation by another bank, if the credit provides for purchase/negotiation.*
>
> . . . . .
>
> c. *Such undertakings can neither be amended nor cancelled without the agreement of all parties thereto. Partial acceptance of amendments is not effective without the agreement of all parties thereto.*[32]

4.2 Confirmed or Unconfirmed Credits

As for confirmed or unconfirmed credits, Article 3 of 1974 UCP states:

> b. *An irrevocable credit may be advised to a beneficiary through another bank (the advising bank) without engagement on the part of that bank, but when an issuing bank authorises or requests another bank to confirm its irrevocable credit and the latter does so, such confirmation constitutes a definite undertaking of the confirming bank in addition to the undertaking of the issuing bank, provided that the terms and conditions of the credit are complied with:*
>
> (i) *to pay, if the credit is payable at its own counters, whether against a draft or not, or*

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[32] UCP 1974 at pp. 16-17.
But cf. Article 3 of UCP (1962 Revision)-- Ellinger DOCUMENTARY CREDIT at pp. 360-361.

> *that payment will be made if the credit provides for payment elsewhere;*
>
> (ii) *to accept drafts if the credit provides for acceptance by the confirming bank, at its own counters, or to be responsible for their acceptance and payment at maturity if the credit provides for the acceptance of drafts drawn on the applicant for the credit of any other drawee specified in the credit;*
>
> (iii) *to purchase/negotiate, without recourse to drawers and/or bona fide holders, drafts drawn by the beneficiary, at sight or at a tenor, on the issuing bank, or on the applicant for the credit or on any other drawee specified in the credit, if the credit provides for purchase/negotiation.*[33]

Article 4 of 1974 UCP elaborates the rules applying to confirmed credits by stating:

> a. *When an issuing bank instructs a bank by cable, telegram or telex to advise a credit, and intends the mail confirmation to be the operative credit instrument, the cable, telegram or telex must state that the credit will only be effective on receipt of such mail confirmation. In this event, the issuing bank must send the operative credit instrument (mail confirmation) and any subsequent amendments to the credit to the beneficiary through the advising bank.*
>
> b. *The issuing bank will be responsible for any consequences arising from its failure to follow the procedure set out in the preceding paragraph.*
>
> c. *Unless a cable, telegram or telex states "details to follow" (or words of similar effect), or states that the mail confirmation is to be the operative credit instrument, the cable, telegram or telex will be deemed to be the operative credit instrument and the issuing bank need not send the mail confirmation to the advising bank.*[34]

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[33] UCP 1974 at pp. 16-17.
But cf. Article 3 of UCP (1962 Revision)--Ellinger DOCUMENTARY CREDIT at pp. 360-361.

[34] UCP 1974 at p. 17.

Article 46 of 1974 UCP describes transferable credit as follows:

> a. A transferable credit is a credit under which the beneficiary has the right to give instructions to the bank called upon to effect payment or acceptance or to any bank entitled to effect negotiation to make the credit available in whole or in part to one or more third parties (second beneficiaries).
>
> b. The bank requested to effect the transfer, whether it has confirmed the credit or not, shall be under no obligation to effect such transfer except to the extent and in the manner expressly consented to by such bank, and until such bank's charges in respect of transfer are paid.
>
> c. Bank charges in respect of transfers are payable by the first beneficiary unless otherwise specified.
>
> d. A credit can be transferred only if it is expressly designated as "transferable" by the issuing bank. Terms such as "divisible", "fractionable", "assignable", and "transmissible" add nothing to the meaning of the term "transferable" and shall not be used.
>
> e. A transferable credit can be transferred once only. Fractions of a transferable credit (not exceeding in the aggregate the amount of the credit) can be transferred separately, provided partial shipments are not prohibited, and the aggregate of such transfers will be considered as constituting only one transfer of the credit. The credit can be transferred only on the terms and conditions specified in the original credit, with the exception of the amount of the credit, of any unit prices stated therein, and of the period of validity or period for shipment, any or all of which may be reduced or curtailed.
>
> Additionally, the name of the first beneficiary can be substituted for that of the applicant for the credit, but if the name of the applicant for the credit is specifically required by the original credit to appear in any document other than the invoice, such requirement must be fulfilled.
>
> f. The first beneficiary has the right to substitute his own invoices for those of the second beneficiary, for amounts not in excess of the original amount stipulated in the credit and for the original unit prices if stipulated in the credit, and upon such substitution of invoices the first beneficiary can draw under the credit for the difference, if any, between his invoices and second beneficiary's invoices. When a

> *credit has been transferred and the first beneficiary is to supply his own invoices in exchange for the second beneficiary's invoices but fails to do so on first demand, the paying, accepting or negotiating bank has the right to deliver to the issuing bank the documents received under the credit, including the second beneficiary's invoices, without further responsibility to the first beneficiary.*
>
> g. *The first beneficiary of a transferable credit can transfer the credit to a second beneficiary in the same country or in another country unless the credit specifically states otherwise. The first beneficiary shall have the right to request that payment or negotiations be effected to the second beneficiary at the place to which the credit has been transferred, up to and including the expiry date of the original credit, and without prejudice to the first beneficiary's right subsequently to substitute his own invoices for those of the second beneficiary and to claim any difference due to him.*[35]

Also, Article 47 of 1974 UCP indicates that the "fact that a credit is not stated to be transferable shall not affect the beneficiary's rights to assign the proceeds of such credit in accordance with the provisions of the applicable law."[36]

5. UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1962 REVISION)

The UCP defines "documentary credit(s)" or "credit(s)" as

> . . . *any arrangement, however named or described, whereby a bank (the issuing bank), acting at the request and in accordance with the instructions of a customer (the applicant for the credit), is to make payment to or to the order of a third party (the beneficiary), or is to pay, accept or negotiate bills of exchange (drafts) drawn by the beneficiary, or authorises such payments to be made*

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[35] UCP 1974 at pp. 27-28.
But cf. Article 46 of UCP (1962 Revision)--Ellinger DOCUMENTARY CREDIT at pp. 368-369.

[36] UCP 1974 at p. 28.

> *or such drafts to be paid, accepted or negotiated by another bank, against stipulated documents and compliance with stipulated terms and conditions.*[37]

Also, UCP provides that "credits, by their nature, are separate transactions from the sales or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts."[38] There is also this provision under the UCP that "credit instructions and the credits themselves must be complete and precise and, in order to guard against confusion and misunderstanding, issuing banks should discourage any attempt by the applicant for the credit to include excessive detail."[39] Also, the UCP provides that "a beneficiary can in no case avail himself of the contractual relationships existing between banks or between the applicant for the credit and the issuing bank."[40] It should be mentioned that as of December 1967 the 1962 UCP has been adhered to by banks collectively in some 153 countries, while in another 20 countries individual banks have also adopted them.[41]

It is stated that the "framework and the wording" of the UCP (1962 Revision) "have been dictated by the practical demands of business."[42] Under the second part--titled "Liabilities and Responsibilities"--the essential aspects of documentary credits is well described as an operation in which all the parties concerned deal in documents and not in goods (Article 8).[43] In the third part--"Documents"--the conditions which the various documents enumerated, such as bills of lading, insurance documents, commercial invoices and certificate of origin, have to fulfill are outlined.[44] Also, in this part a "clean" shipping document "is one which bears no superimposed clause or notation which expressly declares a defective condition of the goods and/or packaging" (Article 16).[45] In the fourth part--"Miscellaneous Provisions"-- the UCP (1962 Revision) deals with expressions like "as soon as possible", "prompt", "about", "circa", as well as the interpretation of date terms, of validity and expiry, and the position of "partial" shipments.[46]

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[37] Ellinger DOCUMENTARY CREDIT at p. 359
Also, see UCP 1974 at p. 15.

[38] Idem.

[39] Ellinger DOCUMENTARY CREDIT pp. 359-360.
Also, see UCP 1974 op. cit. at p. 15.

[40] Ellinger DOCUMENTARY CREDIT at p. 360.
Also, see UCP 1974 op. cit. at p. 15.

[41] Frederic Eisemann "ICC's Stake . . ." op. cit. at pp. 26-27.

[42] Ibid., at p.

It is clear from the foregoing that the UCP (1962 Revision) establishes the basic principle that it is the duty of the applicant for credit to give complete and precise instruction to the issuing bank. It also provides for the second basic principle that the banks duty to comply strictly with the terms and conditions of the credit when taking up the documents. Another principle that UCP stresses is that the documentary credit is a separate undertaking from the basic sales or other contract. It should also be mentioned that in order (for the banks in the countries adhering to the UCP (1962 Revision)) to give effect to the General Provision of the UCP (1962 Revision)--"These provisions and definitions and the following articles apply to all documentary credits and are binding upon all parties thereto unless otherwise expressly agreed"--a statement has to be included in the request being made by the applicant for credit as well as in the letter of credit itself. In this way the UCP becomes a term in the contract governing the transactions.

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[43] Ellinger DOCUMENTARY CREDIT at p. 361.
Also, see UCP 1974 op. cit. at p. 18.

[44] Ellinger DOCUMENTARY CREDIT at p. 363.
Also, see UCP 1974 op. cit. at p. 20.

[45] Ellinger DOCUMENTARY CREDIT at p. 363.
Also, see UCP 1974 op. cit. at p. 21.

[46] Ellinger DOCUMENTARY CREDIT at pp. 366-368.
Also, see UCP 1974 op. cit. at pp. 24-26.

6. EL NASR CASE

A recent decision of the English Court of Appeal in W. J. Allan & Co. Ltd. v. El Nasr Export & Import Co. clearly touched the important principles applying to documentary credits. Lord Denning explained banker's commercial credit in this way:

> *This is a typical case of the use of commercial letters of credit. Here we have a seller of coffee in Kenya. He sells it to a buyer in Tanzania. That buyer resells to a second buyer in Spain.*
>
> *The Kenyan seller is not willing to part with the goods or the documents relating to them unless he is assured of payment. So, he stipulates with his Tanzanian buyer that payment is to be made by "confirmed irrevocable letter of credit". . . . That means that the Tanzanian buyer must establish in favour of the Kenyan seller a letter of credit by which a banker promises to pay the price--or to accept drafts for the price--in exchange for the shipping documents relating to the goods, for example, the bill of lading, invoice and so forth. The letter of credit must be irrevocable. . . . The letter of credit must, in addition, be "confirmed". That is to say, it must be confirmed by a banker who is readily accessible to the seller (that is, in Nairobi or Dar es Salaam): because the seller wants to be able to go to such a banker and get payment against documents. . . .*
>
> *The Tanzanian buyer did not himself go to his own banker to establish the credit. He sold the coffee to a Spanish buyer and stipulated that the Spanish buyer establish a "transferable" letter of credit in his*

> favour. The intention of the Tanzanian buyer was, of course, to transfer so much of it as was necessary to meet his obligations to the Kenyan seller. The Spanish buyer then went to his bank in Madrid. . . . The Madrid bank were the "issuing bank" and, by issuing the letter of credit, they gave their promise to honour it in exchange for documents in accordance with its terms.
>
> The Tanzanian buyer, armed with that credit from the Madrid bank, went to his own bank in Dar es Salaam and told them that he wantea to "transfer" to the Kenyan seller so much of it as was necessary to meet his obligations to the Kenyan seller. He also asked them to "confirm" it. . . .
>
> The Tanzanian bank then issued their confirmation to the Kenyan seller. They were the "confirming" bank. By it they promised to pay the Kenyan seller the price of the goods against delivery of documents. . . .
>
> These promises by the issuing banker and by the confirming banker are, of course, enforceable against the bank by the seller.[47]

It is clear that Lord Denning thought that the credit is enforceable against the banks by the seller and this is also the position of the commercial community--since this is crucial to the operation of the commercial letter of credit. It should be pointed out that certain questions that have caused problems in the past, such as whether payment by banker's credit is conditional or absolute, were definitively answered in the El Nasr case. In the court below, Orr J. stated

> I reach this conclusion as a matter of principle because it seems to me wrong that the primary obligation of the buyer to pay the price should be treated as extinguished unless there is some clear indication that both parties so intended, and it seems to me that the provision for payment by way of letter of credit, which is an arrangement not for the benefit of the seller alone, but of both parties, falls far short of any such indication, and as far as authority goes, I think that on the whole the balance of such authority as there is favours the same

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[47] (1972) 2 Q.B. 189 at pp. 207-208.

> *view. I therefore hold that in the present case the buyers' obligation to pay the price continued to subsist notwithstanding the opening of the credit.*[48]

On the other hand, Lord Denning expressed himself by observing:

> *I am of the opinion that in the ordinary way; when the contract of sale stipulates for payment to be made by confirmed irrevocable letter of credit, then; when the letter of credit is issued and accepted by the seller, it operates as conditional payment of the price. It does not operate as absolute payment.*[49]

It should be pointed out that the writers also hold that payment is conditional payment.[50]

Another question usually posed concerns what Ellinger has described as the nature of buyer's duty to procure the opening of the credit.[51] Ellinger states:

> *It is true that the making of the contract of sale precedes the opening of the irrevocable credit. The contract of sale, however, imposes on the buyer a duty to procure an irrevocable credit, and this obligation of the buyer is a condition precedent to the seller's duty to perform his bargain. Until the irrevocable credit reaches the hands of the seller, he is under no duty to perform. . . . The commencement of the irrevocability of the letter of credit and the maturity of the seller's obligation to perform the contract of sale are thus simultaneous.*[52]

In Trans Trust S.P.R.L. v. Danubian Trading Co. Ltd. there were contracts made to sell steel and the plaintiff sellers, sued for damages for failure by the buyers to procure the necessary credit. In a judgment in favour of the sellers, Denning L.J. (as he then was) said:

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[48] (1971) 1 Lloyds Rep. 401 at p. 419.

[49] (1972) 2 Q.B. at p. 212.

[50] Ellinger DOCUMENTARY CREDIT at pp. 138 et seq. See also, Gutteridge and Megrah op. cit. at p. 33. Davis op. cit. at p. 48; Cheshire and Fifoot LAW OF CONTRACT 8th Edition at p. 433 (1972) and CHITTY ON CONTRACTS 23rd Edition Vol. 2 at pp. 226-227 (1968).

[51] Ellinger DOCUMENTARY CREDIT at pp. 131-136.

[52] Ellinger DOCUMENTARY CREDIT at p. 89.

> *What is the legal position of such a stipulation? Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation "subject to the opening of a letter of credit" is rather like a stipulation "subject to contract". If no credit is provided, there is no contract between the parties. In other cases a contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of a contract, but to the obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit. . . .*
>
> *It is clear that the stipulation for a credit was not a condition precedent to the formation of any contract at all. It was a condition which was an essential term of a contract actually made.*[53]

It should be mentioned that for Ellinger to state that the seller is under no duties ordinarily until the buyer's credit is opened, it would be essential to hold that the opening of the credit has to be a condition precedent that does not negative the existence of the contract, but suspends the seller's duties under the contract until it is met. As Ellinger regards the contract of sale preceding the opening of the credit, he would seem to clearly disagree with Lord Denning's position that sometimes it is a condition precedent to the formation of the contract of sale itself. Similarly, Ellinger's position would seem also to conflict with Lord Denning's other example quoted above. It is clear that Trans Trust S.P.R.L. v. Danubian Trading Co. Ltd. is not a case of suspensive condition. In fact the judgment of the English Court of Appeal supports the view that the buyer's duty to open the credit is not a suspensive condition but usually an ordinary essential term of the contract of sale.

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[53] (1952) 1 Lloyds Rep. 342 at pp. 355-356.

Another question relates to the waiver by one party of his strict rights under the contract of sale or the credit itself. It is clear, according to Panoutsos v. Raymond Corp. of New York,[54] that the seller can waive his right under to a credit in strict conformity with the contract of sale. In that case, a flour buyer was required to open a confirmed credit in New York. Although the credit opened was unconfirmed, the sellers shipped the flour to a Greek buyer and also obtained an extension of time for shipment. The English Court of Appeal held that the sellers had waived their rights to a credit that was confirmed. They accepted the buyer's contention that "the sellers were entitled to insist upon the performance of the condition, but that having waived its performance hitherto, they must give reasonable notice to the buyer of their intention to insist upon its performance in the future so as to give him an opportunity of putting the credit right."[55] In Enrico Furst & Co. v. W. E. Fischer Ltd., the plaintiff buyers had opened a credit for the purchase of piping, but this did not conform to the sale contract of being open and irrevocable in London. The defendant sellers ignored this and obtained an extension of time for the credit.

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[54] (1917) 2 K.B. 473.

[55] Ibid., at p. 477.

Diplock J. observed that "it seems to me to be a classic case of waiver indistinguishable . . . from the decision in Panoutsos v. Raymond Hadley Corp. of New York."[56]

In Soproma S.P.A. v. Marine & Animal By-Products Corp., where the sellers acted on the non-confirmed credit, McNair J. expressed himself in this way:

> *In my judgment, by so acting, the sellers must be taken to have accepted the position that their letters of credit were in order and, not having at any time given notice to the buyers that they required letters of credit in strict conformity with the contract, they are precluded (whether the matter is put as waiver, variation or estoppel) from now saying that the letters of credit were not in order. . . .*[57]

In the El Nasr case, the credit had been opened in the wrong currency and the buyer was therefore in breach, but the Court of Appeal held that the sellers had waived their right.[58] Lord Denning further observed:

> *I know that it has been suggested in some quarters that there must be detriment. But I can find no support for it in the authorities cited by the judge. The nearest approach to it is the statement of Viscount Simonds in the Tool Metal case [1955] 1 W.L.R. 761, 764, that the other must have been led "to alter his position," which was adopted by Lord Hodson in Ajayi v. R.T. Briscoe (Nigeria) Ltd. [1964] 1 W.L.R. 1326, 1330. But that only means that he must have been led to act differently from what he otherwise would have done.*[59]

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[56] (1960) 2 Lloyds Rep. 340 at p. 348.

[57] (1966) 1 Lloyds Rep. 367 at p. 386.

[58] (1972) 2 Q.B. at p. 212 (Lord Denning M.R.) and p. 218 (Megaw L.J.).

[59] Ibid., at p. 213.

During the judgment he carefully reviewed the authorities and expounded on what he considered the equitable doctrine to be and concluded that: -

> *In none of these cases does the party who acts on the belief suffer any detriment. It is not a detriment, but a benefit to him, to have an extension of time or to pay less, or as the case may be. Nevertheless, he has conducted his affairs on the basis that he has that benefit and it would not be equitable now to deprive him of it.*[60]

On the other hand, many have found the English law in this area to be hardly satisfactory. Lord Hailsham has recently indicated that: "The time may soon come when the whole sequences of cases based on promissory estoppel since the war beginning with Central London Property Trust Ltd. v. High Trees House Ltd. . . . may need to be reviewed and reduced to a coherent body of doctrine by the courts."[61]

Omer Hershey had as early as 1918 carried out a thoughtful analysis of the law so as to find a legal basis on which uniformity could be developed. He had noted that progress on the subject was hindered, if not warped, on the European continent by preconceptions, emerging from the law of contract, which led to the characterization of the letter of credit promise as arising from the contract of mandatum. Similarly, Anglo-American efforts encountered problems in trying to fit the letter of credit promise into contract law, because as mentioned previously, of the absence of privity, as well as consideration.[62] Both Omer Hershey and Herman Finkelstein[63] had advocated the acceptance of the letter of credit as a "mercantile speciality".

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[60] Idem.

[61] Woodhouse A. C. Israel Cocoa Ltd. S.A. v. Nigerian Produce Marketing Co. Ltd. (1972) A.C. 741 at p. 758.

[62] Hershey op. cit. at pp. 8 et. seq.

[63] Herman Finkelstein LEGAL ASPECTS OF COMMERCIAL LETTERS OF CREDIT (1930).

Boris Kozolchyk, after reviewing the various theories, states that the legal nature of the commercial letter of credit can best be understood if viewed in the light of a formal legal transaction. Accordingly, he concludes:

> The irrevocable letter of credit can therefore be said to be a mercantile speciality embodying a formal monetary promise. The degree of moneyness of this promise depends on factors such as the type of letter of credit, the stage of the transaction, the type of defense raised, and so on. Accordingly, the commercial letter of credit may be defined as a formal and certain promise embodying an abstract obligation to accept a draft or demand for payment upon literal compliance with its terms. Hence, the commercial letter of credit does not belong in the realm of simple contract law but squarely within the field of negotiable instruments, despite the fact that its promise may not necessarily meet the requirements of unconditionality [of negotiable instruments law] as specified in certain jurisdictions.[64]

6. 1974 UNIFORM CUSTOMS AND PRACTICE OF DOCUMENTARY CREDIT

As indicated previously the International Chamber of Commerce's work in this field has been one of a continuing nature. Accordingly, it had undertaken to revise the text of the UCP (1962 Revision). It entrusted the task to the ICC Commission on Banking Techniques and Practice.[65] The ICC Commission in turn appointed a Working Party which made draft proposals to it. The general lines of the complete draft revision were adopted by the ICC Commission at its meeting on 1st February 1974.[66] It should be mentioned that draft was prepared after taking into consideration the comments that were submitted on earlier proposals for revisions. These comments came from, not only the National Committees of ICC, but also through the auspices of the United Nations from Chambers of Commerce of the socialist countries and from countries not represented in ICC.

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[64] Kozolchyk op. cit. at p. 599.

[65] U.N. Doc. A/CN.9/89/Conf.1 at p. 1

[66] Idem.

The explanation given for the revision has been described as follows:

> *Since 1962, however, there have been major--and unstabilizing--changes in international commercial practices and transport technology. Traditional break-bulk cargo handling and single mode carriage of goods have met increasing competition from the newer techniques of containerised cargo (and other forms of unit load), and from the resultant development of through, door-to-door multi-modal transport. Terms of sale have consequently moved away from the traditional bases of F.O.B. and C.I.F. Further, the very success of the ICC code and its global application--by the banks of 175 countries--have resulted in differences of outlook and understanding which have militated against uniform interpretation.*
>
> *So the ICC has revised and updated the code to enable it to meet the day-to-day needs of international trade and its finance.*[67]

The 1974 Uniform Customs and Practice for Documentary Credits [Appendix C] contains a number of changes, along with some substantive amendments to the UCP (1962 Revision). It should be mentioned that a number of new articles takes particular note of the impact of the expansion of combined and containerised transport. Article 19 (b) (iii) of 1974 UCP provides that unless otherwise specified in the credit, a Container Bill of Lading is acceptable.[68] Article 17 of 1974 UCP permits, unless otherwise specified in the credit, the acceptance of the customary "said by shipper to contain" or "shipper's load and count" type of contents clause.[69]

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[67] B. S. Wheble "Documentary Credits--The International Chamber of Commerce Code of Practice" 1976 Lloyd's Maritime Commercial Law Quarterly 8 at p. 9.

[68] UCP 1974 at p. 21.

> *Multi-modal transport and the multi-modal transport document are also post-1962 developments-- and have therefore caused uncertainty in documentary credit practice. The basis of multi-modal transport is that one legal entity--called a Combined Transport Operator (CTO)--arranges, and accepts liability for the performance of, the whole door-to-door movement and accepts liability for loss or damage throughout the whole transport; and evidences all this by issuing a carrier-type document usually referred to as a "Combined Transport Document". There is at present no international convention to give a known legal status to such a document, or to govern this liability of the issuer, the CTO. Consequently, there is a wide variety of combined transport documents in use; and the problem is to know which ones are acceptable and which are not.*[70]

Article 23 (a) of 1974 states:

> *If the credit calls for a combined transport document, i.e., one which provides for a combined transport by at least two different modes of transport, from a place at which the goods are taken in charge to a place designated for delivery, or if the credit provides for a combined transport but in either case does not specify the form of document required--and/or the issuer of such document, banks will accept such documents as are tendered.*[71]

Further the expression "taken in charge" is recognized in Articles 15, 16(a) and 27.[72]

It has been argued that these uniform rules generally correspond to actual banking practices and bear direct relation to market conditions. However, it must be mentioned that the peculiar economic condition of the developing countries cannot be altered by merely permitting incremental changes of the rules which inevitably perpetuates the status quo. In any case the developing countries maintain that these rules are based on premises which invariably discriminates against them.

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[69] UCP 1974 at p. 20.

[70] B. S. Wheble op. cit. at p. 10.

[71] UCP 1974 at p. 22.

[72] UCP 1974 at pp. 20 and 23.

CHAPTER VIII

BILLS OF LADING

1. CARRIAGE OF GOODS BY SEA
   - 1.1 *Common Carriers and Private Carriers*

2. HISTORY OF THE LIABILITY OF CARRIERS
   - 2.1 *Absolute Liability*
   - 2.2 *Coggs v. Bernard*
   - 2.3 *Niagra v. Cordes*

3. CONTRACT OF AFFREIGHTMENT

4. BILLS OF LADING
   - 4.1 *General*
   - 4.2 *Bills of Lading Act, 1855*
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5. THE HAGUE RULES
   - 5.1 *Scope and Nature*

6. REVISION OF THE HAGUE RULES

7. UNCITRAL'S DRAFT CONVENTION ON THE CARRIAGE OF GOODS BY SEA

Overview

This chapter deals with the development of bills of lading. The rules governing bills of lading originate in the various national maritime laws and the provisions of the Hague Rules. Since this more or less uniform body of maritime law has been shaped by the developed nations, and most particularly by those nations with shipping interests, it may be vested with a bias unsuitable to many developing countries. To the extent that maritime law favours carrier interests over cargo interests, it is inimical to the developing countries because, by and large, they do not have substantial merchant fleets. In any event, those countries that do not choose to acquire or develop a substantial merchant fleet have an obvious claim in seeing that the law does not discriminate against cargo interests.

The central question is, how should losses arising from the carriage of goods by sea be allocated? Historically, the carrier was absolutely liable for loss or damage to the cargo (whether or not he was negligent) regardless of the cause of the loss or damage, subject only to certain specified excepted perils--the so-called common law exceptions. However, where the loss was caused by one of the common law exceptions, the carrier was still liable if he was negligent or otherwise at fault. Also, in all contracts of carriage by sea, there were certain implied terms (unless expressly excluded) that the vessel was seaworthy and that the voyage would be commenced and carried out with reasonable diligence and without unjustifiable deviation.

Until the 1880s the shipowner's liability was in theory strict. The bill of lading was the basic shipping document, embodying (or evidencing) the contractual relationship between the carrier and the cargo despatcher. With the insertion of provisions known as "exoneration clauses" or "negligence clauses" in the bill of lading or other document, shipowners began to limit contractually the strict liability imposed upon them. The widespread use of the "freedom of contract" principles as expressed in both the common law and civil law systems virtually reversed the situation and the carriers came to exempt themselves from practically every liability of ocean carriage.

The struggle between the shipowning and cargo interests came to a head by the developments that ensued in the United States and the British Dominions, whose maritime trade at that time was dependant on British shipowners. The result was the enactment in the United States of the Harter Act of 1893; in Australia of the Sea Carriage of

Goods Act of 1904; in New Zealand of the Shipping and Seaman Act of 1908 and in Canada of the Canadian Water Act of 1910 (the so-called cargo shippers' countries) in order to remove the chaos and abuse produced by unlimited "freedom of contract".

It also came to be realized by both shipowning and cargo interests that further reform was needed which would have to be based on an international agreement if it was to be of any practical value to maritime commerce. In 1924 the Hague Rules were the ensuing result. A demand for the revision of the Hague Rules arose in 1963 as a consequence of three British judicial decisions, coupled with a desire by some countries for a change after some forty years of the Rules. The 1963 Stockholm draft protocol (generally referred to as the Visby Rules) was the basis of the 1968 Brussels Protocol that amended the Hague Rules.

From the developing countries perspective the present need for further revision of the Hague Rules being undertaken by UNCITRAL is predicated on the assumption that the current balance of equities favours the shipowners as against the cargo interests. Since most of the developing countries fall in the latter category, therefore, the allocation of liability for loss under the Hague Rules has frequently worked to their disadvantage.

The historic milieu of bills of lading has invariably been connected with maritime carriage. It is within the context of the carriage of goods by sea that the rights and obligations of sea carriers and the rules governing their liability for loss or damage to cargo has to be examined. Further, the extent of the liability relative to different modes of transportation--land, air and sea--

and the discrepancies between them clearly demonstrates that the sea carrier enjoys a considerable, as well as a unique, advantage compared to road, rail or air carriers.[1] This comparative advantage was due largely to the peculiar rules governing the sea carriers' liability, developed historically mainly under the influence of the Common Law. It is to the Common Law[2] that we must turn to appreciate this peculiar situation in international carriage.

1. CARRIAGE OF GOODS BY SEA

Under the common law, as expounded in Liver Akali Company v. Johnson,[3] Lord Esher maintained that there were three classes of carriers of goods namely:

> (1) *common carriers, who held themselves out as ready to carry goods delivered to them.*[4] *They were under a duty to accept goods for carriage, and were liable as insurers for the safety of the goods*[5] *unless the loss or damage to the goods was caused by either*
>
> *(a) an act of God;*[6] *or*

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[1] David M. Sassoon "Liability for the International Carriage of Goods by Sea, Land and Air: Some Comparisons" in Fabricus INTERNATIONAL TRADE at p. 325.

[2] "Internal evidence makes it clear that [the Hague Rules] were intended to be based on a structure of English Law," Poor THE AMERICAN LAW OF CHARTER PARTIES AND OCEAN BILLS OF LADING Fifth Edition at p. 143 (1968).

[3] (1874) L.R. 9 Ex. 338.

[4] Jackson v. Rogers (1683) 2 Show. 327.

[5] Barclay v. Cuculla y Gana (1784) 3 Doug. 389.

[6] An act of God was described as those circumstances so unexpected that no human foresight or skill could reasonably anticipate--Nugent v. Smith (1876) 1 C.P.D. 423 at p. 434-8.
[Continued on next page.]

(b) an act of the Queen's enemies,[7] *or*

(c) the fault of the owner or shipper,[8] *or*

(d) the inherent vice of the cargo,[9] *or*

(e) jettison,[10] *or*

(f) fraud by the cargo owner or shipper.[11]

However, even where the immediate cause of damage was any of the first five causes described above, the carrier was still liable if he was guilty of contributory negligence,[12] or if the damage was caused by the unseaworthiness of the ship.[13] A carrier was also liable if he deviated

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[Continued from p.263]

According to Scrutton an act of God includes "any accident as to which a shipowner can show that it is due to natural causes, directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight, pains and care, reasonably to be expected from him"--SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING Seventeenth Edition by Sir William Lennox McNair, Sir Alan Abraham Mocatta and Michael J. Mustil (hereinafter cited as SCRUTTON ON CHARTERPARTIES) at p. 219 (1964).

7. This was usually limited to acts in time of war--Curtis and Sons v. Mathews (1919) 1 K.B. 425.

8 Hart v. Baxandale (1867) 16 L.J. 390.

9 The inherent vice was some defect which was inherent in the cargo, e.g., latent defect in fruit--Bradley v. Federal Steam Navigation Company (1927) 137 L.T. 266.

10 This was only open to the carrier where the goods were intentionally sacrificed in order to preserve the safety of the ship and the cargo as a whole. In such a case the principle of "general average" applied. The parties whose goods were preserved contributed to the loss suffered by those whose goods were sacrificed--Birkley v. Presgrave (1801) 1 East. 220 at p. 228; Tucker v. Cappos (1625) 2 Roll Rep. 497 at p. 498.

11 Gibbon v. Paynton (1769) 4 Burr. 2298 at p. 2300.

12 Siordet v. Hall (1828) 2 Bing. 607.

13 Under common law, there was implied in every contract for the carriage of goods by sea a warranty that the ship was seaworthy, that is, it was reasonably fit for the intended voyage--Stanton v. Richardson (1872) L.R. 7 C.P. 421, unless the warranty was expressly excluded --Bank of Australasia v. Clan Line (1916) 1 K.B. 39 at p. 55.

except to save or attempt to save lives and to avoid imminent peril to the ship or cargo.[14]

> (2) public carriers, those who carried on the profession of carriage of goods by sea but were not under a duty to accept goods, however, if they did they were liable to the same extent as the common carrier;
>
> (3) carriers who did not carry on the profession of carrying goods by sea but merely did it incidentally to their main business, i.e., private carriers.[15] They reserved the right to carry or not, and were under no duty to accept goods.[16]

1.1 Common Carriers and Private Carriers

The question then arose as to what criteria were applied to distinguish one form of a carrier from another. M. E. Holdsworth in THE LAW OF TRANSPORT was of the opinion that it

> . . . is not always easy to determine to which class a particular carrier belongs for they rarely put their profession formally into writing though sometimes they give public notice that they are not Common Carriers of certain goods and so it generally has to be decided from their past conduct, the types of vehicles they use and the other surrounding circumstances. But once it is proved that the carrier is a Common Carrier of the particular consignment in question, he is placed in a very different legal position from that of a private carrier or other bailee for reward. The Common Carrier's profession may be limited to any extent in respect of the kinds of goods and the termini of the carriage and the profession may be varied from time to time; he may also be a private carrier as well of such goods as are

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[14] Scaramanga v. Stamp (1880) 5 C.P.D. 295.

[15] Consolidated Tea and Lands Company v. Oliver's Wharf (1910) 2 K.B. 395.

[16] Lord Chorley and O.C. Giles SHIPPING LAW Fifth Edition, at pp. 92-93 (1965).

> *not within his public profession; he may also withdraw his profession altogether if he goes the proper way about it, but as long as a carrier is a Common Carrier he is in two quite different respects under a serious legal liability; one is his obligation to carry and the other is his liability for any loss or injury to the goods while in the courses of carriage.*[17]

In Ingate v. Chrisite,[18] the criterion of the distinction between a common carrier and a private carrier, according to Alderson B., was whether the carrier "carries for particular persons only, or whether he carries for everyone. . . . Everybody who undertakes to carry for everyone who asks him is a common carrier,"[19] while a person who undertakes to carry goods only for certain persons is not a common carrier but a private carrier. "The essential part of the definition of a common carrier is that he professes to the public his readiness to carry for any one who wishes to engage his services and is prepared to pay his charges. By this 'profession' he 'holds himself out' as one who exercises a 'public calling'."[20]

The position in the United States of America, according to Hutchinson, was somewhat similar. He also made a distinction between three classes of carriers: common or public carriers for hire; private carriers for hire; and carriers without hire or reward.[21] Hutchinson also held that carriers are to be considered as one class of bailees.[22]

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[17] M. E. Holdsworth THE LAW OF TRANSPORT at p. 45 (1932).

[18] (1850) 3 Car. & Kir. 61.

[19] Idem.

[20] Otto Kahn-Freund THE LAW OF CARRIAGE BY INLAND TRANSPORT Fourth Edition at p. 196 (1965).

[21] R. Hutchinson A TREATISE ON THE LAW OF CARRIERS AS ADMINISTERED IN THE COURTS OF THE UNITED STATES, CANADA AND ENGLAND Vol. 1 Edited by S. Matthews and W. Dickinson at Sec. 15 (1906).

2. HISTORY OF THE LIABILITY OF CARRIERS

In early law, Holdsworth holds, no distinction was made between ownership and possession.[23]

> *The liability of the carrier has always been an anomaly in English law. The causes of this anomaly are rooted deep in the origins of legal history. In the early days of the common law, and for long periods afterwards, a carrier occupied the same position in the eye of the law as any other bailee. It follows that the origin of the modern law of Carriage of Goods has to be sought in the early law of bailments.*[24]

2.1 Absolute Liability

The absolute liability of the carrier at common law[25] was ascribed to (1) a Germanic origin with a continuous history from the time of the Conquest (Mr. Justice Holmes' theory[26]); (2) an Elizabethan innovation applicable to carriers by land, and afterwards extended to carriers by water (views of Sir William Jones[27]); (3) as a derivative from the Pretorian edict regarding shipmasters, and thence incorporated into the common law relating to carriage by land (Mr. Justice Brett's opinion[28]).

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[22] Ibid., at Sec. 1.

[23] William Holdsworth A HISTORY OF ENGLISH LAW Vol. 2 Fourth Edition at p. 79 (1936).

[24] Quoted in Lars Gorton THE CONCEPT OF THE COMMON CARRIERS IN ANGLO-AMERICAN LAW at pp. 60-61 (1971).

[25] Chiang "The Characterization of a Vessel as a Common or Private Carrier" 48 Tulane Law Review 299 (1973-74).

[26] Oliver Wendell Holmes THE COMMON LAW Edited by M. D. Howe at pp. 130 et seq. (1963).

[27] W. Jones AN ESSAY ON THE LAW OF BAILMENTS (1781).

Holmes[29] and Holdsworth[30] both held that the law of bailment was entirely of Germanic origin and was based on the principle of absolute liability which lasted through the middle ages. According to Mr. Justice Holmes, in the early law (Germanic in origin) chattels bailed were absolutely at the risk of the bailee. He based his argument on the rule that if chattels were left by their owner with another, the bailee, and not the bailor, was the proper party to sue for their wrongful appropriation.[31] In this way, according to him, the "principle was directly decided in accordance with the ancient law"[32] in Southcote's Case (1601)[33] and that the ordinary action against the bailee[34] was detinue.[35] However, as important changes took place in procedure in the seventeenth century, the remedy was the action on the case.[36] For case to lie for nonfeasance some duty had to be shown, and the duty to act was alleged by the well-known words, super se assumpsit,[37] or by stating that he was engaged in a common occupation.[38] "The overthrow of Southcote's Case and the old common law may be said to date from Coggs v. Bernard."[39]

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[28] Nugent v. Smith (1875) i C.P.D. 19 at p. 29.

[29] Holmes op. cit. at pp. 130 et seq.

[30] William Holdsworth HISTORY OF ENGLISH LAW Vol. 3 Fifth Edition at p. 336 (1942).

[31] Holmes op. cit. at pp. 166-167.

[32] Ibid., at p. 178

[33] (1601) 4 Coke Rep, 83b.

[34] Three types of actions were open to the bailor against the bailee: detinue, account and case--Joseph Beale "The Carrier's Liability: Its History" 1 Harvard Law Review 158 at p. 159 (1877-78).

[35] Frederic W. Maitland THE FORMS OF ACTION AT COMMON LAW at pp. 61-63 (1954).

[36] An action on the case was one brought to recover damages for loss or injury resulting not directly but indirectly or consequentially, from the act complained of -- Ibid., at p. 66.

Against this theory, Plucknett states "it seems clear that from Britton down to 1431 it was familiar doctrine that a bailee was liable for fraud and negligence only. Just after the middle of the fifteenth century the discussion took a different turn."[40]

Sir William Jones, under the heading of a species of bailments called locatio operis mercium vahendrum, dealt with carriers for hire and he observed that a

> . . . carrier for hire, ought, by the rule, to be responsible only for ordinary neglect, and, in the time of Henry VIII; it appears to have been generally holden, that a common carrier was chargeable, in case of loss by robbery, only when he had travelled by ways dangerous for robbing, or driven by night, or at any inconvenient hour: but, in the commercial reign of Elizabeth, it was resolved, upon the same broad principles of policy and convenience, that have been mentioned in the case of innholders, that, if a common carrier be robbed of the goods delivered to him, he shall, answer for the value of them . . . All that has just been advanced concerning a landcarrier, may therefore, be applied to a bargemaster or boatman.[41]

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[37] Assumpsit was an action to recover damages for simple contract. Ibid., at pp. 68-70.

[38] Beale op. cit. at pp. 183-184.

[39] Ibid., at p. 196.

[40] T.F.T. Plucknett A CONCISE HISTORY OF THE COMMON LAW Fifth Edition at p. 478 (1956).

[41] W. Jones op. cit. at pp. 103 and 107.

After discussing Lord Holt's rule as to common carriers, he adds that

> *. . . a momentary attention to the principles must convince us, that this exception [of the act of God, or the King's enemies] is in truth part of the rule itself, . . . : a carrier is regularly answerable for neglect, but not, regularly, for damage occasioned by the attacks of ruffians, any more than for hostile violence, or unavoidable misfortune; but the great maxims of policy and good government make it necessary to except from this rule the case of robbery, lest confederacies should be formed between carriers and desperate villians with little or no chance of detection.*[42]

On the other hand Mr. Justice Brett's explanation of the common law rule was that it could be traced to the Praetor's edict dealing with responsibility of shipowners[43] and innkeepers (which was the basis of the English law of bailment) and was extended from shipowners to common carriers by land.[44] Otto Kahn-Freund was of the opinion that "the conception of a common carrier was developed in connection with road carriers and not in connection with carriers by sea."[45] In Liver Akali v. Johnson[46] and Nugent v. Smith,[47] Brett J. laid down the rule that the libaility of the shipowner was the same as that of the common carrier.

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[42] Ibid., at p. 104.

[43] The strict liability was imposed on the sea carrier through the Praetor's edict--T. Donges THE LIABILITY FOR SAFE CARRIAGE OF GOODS IN ROMAN-DUTCH LAW at p. 69 (1928).

[44] Nugent v. Smith (1875) 1 C.P.D. 19.

[45] Kahn-Freund op. cit. at pp. 204-205.

[46] (1874) L.R. 9 Ex. 388 at p. 344.

[47] (1876) 1 C.P.D. 19 at p. 33.

2.2 Coggs v. Bernard

It should be pointed out that bailment in English law was usually described as a voluntary parting of possession.[48] In Coggs v. Bernard[49] bailments were divided by Lord Holt into six kinds on the basis of the Civil Law, involving rights and duties on the part of the bailor and bailee. In that case the defendant Bernard had assumed without pay safely to carry several casks of brandy from one cellar to another, but managed them so negligently that one of them broke. Lord Holt rejected the defendant's argument that no consideration had been given and still held him liable because he had started to move the casks. He also outlined the common law liability of carriers as follows:

> *As to . . . a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a public employment, or a delivery to a private person. First if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, etc. . . . The law charges this person thus intrusted to carry goods, against all events but acts of God, and of the enemies of the king. For though the force be never so great, as if an irrestible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an*

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[48] G. Paton BAILMENT IN THE COMMON LAW p. 37 (1952).

[49] (1703) 2 Ld. Raym. 909.

> *opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would be possible to discover.*[50]

In Forward v. Pittard,[51] Lord Mansfield accepted Lord Holt's view and it is stated that from that time the true origin of the carrier's peculiar liability began. "The right of the shipper to sue a common carrier upon his contract was not recognized until 1750. For centuries prior thereto the exclusive remedy in carriage had been in tort."[52] The common carrier's liability as previously mentioned at common law was absolute with only some specified exceptions (these were termed the common law "excepted perils"). During the seventeenth century saw the emergence of the idea of freedom of contract. In time, however, the carrier was thus able to exclude or limit his liability by express terms in the contract of carriage and usually included the following: act of God, act of the Queen's enemies, restraint of princes or rulers,[53] perils of the seas,[54] fire,[55] barratry,[56] piracy,[57] robberty and theft,[58] collisions, strandings and accidents of navigation.[59] The private carrier, on the other hand, was only liable when loss or damage resulted from his negligence.[60]

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[50] Idem.

[51] (1785) 1 T.R. 27.

[52] T. Sundberg AIR CHARTER A STUDY IN LEGAL DEVELOPMENT at p. 163 (1961).

[53] This covered acts of a sovereign state in the exercise of its sovereign power--Rodonachi v. Elliott (1874) L.R. 9 C.P. 518; Luigi Monta of Genoa v. Cechofracht Company (1956) 2 Q.B. 552.

[54] Any sudden and unexpected peril naturally arising in connection with a voyage by sea--Wilson and Company v. The Xantho (Cargo Owners) (1887) 12 App. Cas. 503.

[55] Situations not specifically covered by section 502 of the English Merchant Shipping Act, 1894 (section 502 provides--"The owner of a British ship or any share therein shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or priority in the following cases, namely:--(i) where any goods, merchandise or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship; . . .")--57 & 58 Vict., 1894, c. 60.

In the United States, as early as 1848, the U.S. Supreme Court held:

> The general liability of the carrier, independently of any special agreement, is familiar. He is chargeable as an insurer of the goods and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from inevitable accident,--in other words the act of God or the public enemy.[61]

2.3 Niagra v. Cordes

In Niagra v. Cordes[62] the U.S. Supreme Court thoroughly considered the common carrier doctrine and in fact stated:

> A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. He is, in general, bound to take the goods of all who offer, unless his complement

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[56] Barratry was any act of open and wilful defiance by the crew against the master (or by the master and crew against the authority of the owner) whereby goods were damaged--Vallejo v. Wheeler (1774) 1 Cowp. 143.

[57] Republic of Bolivia v. Indemnity Mutual Marine Assurance Co. (1908) 1 K.B. 785.

[58] De Rothschild v. Royal Mail Steam Packet Company (1852) 7 Exch. 734.

[59] Wilson and Company v. The Xonths (Cargo Owners) (1887) 12 App. Cas. 503.

[60] Nugent v. Smith (1876) 45 L.J.Q.B. at pp. 700 et.seq.--per Cockburn C.J.

[61] New Jersey Steam Navigation Co. v. Merchants' Bank of Boston 47 U.S. (6 How.) 344 at p. 381 (1848).

[62] 62 U.S. 7 (1858).

for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey. In all cases where there is no special agreement to the contrary, he is entitled to demand the price of carriage before he receives the goods; and if not paid, he may refuse to receive them; but if he takes charge of them for transportation, the non-payment of the price of carriage in advance will not discharge, affect or lessen his liability as a carrier in the case, and he may afterwards recover the price of the service performed. When he receives the goods, it is his duty to take all possible care of them in their passage, make due transport and safe and right delivery of them at the time agreed upon; or in the absence of any stipulation in that behalf, within a reasonable time. Common carriers are usually described as of two kinds, namely carriers by land and carriers by water. At common law, a carrier by land is in the nature of an insurer and is bound to keep and carry the goods entrusted to his care safely, and is liable for all losses, and in all events, unless he can prove that the loss happened from the act of God, or the public enemy, or by the act of the owner of the goods.

Common carriers by water, like common carriers by land, in the absence of any legislative provisions prescribing a different rule, are also, in general, insurers, and liable in all events, and for every loss or damage, however occasioned, unless it happen by the act of God, or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading. A carrier's first duty, and one that is implied by law, when he is engaged in transporting goods by water, is to provide a seaworthy vessel, tight and staunch, and well furnished with suitable tackle, sails or motive power, as the case may be, and furniture necessary for the voyage. She must also be provided with a crew, adequate in number and sufficient and competent for the voyage, with reference to its length and other particulars, and with a competent and skillful master, of sound judgment and discretion; and in general, especially in steamships and vessels of the larger size, with some person of sufficient ability and experience to supply his place temporarily, at least in case of his sickness or physical disqualification. Owners must see to it that the master is qualified for his situation, as they are, in general, in respect of goods transported for hire, responsible for his acts and negligence. He must take care to stow and arrange the cargo, so that different goods may not be injured by each other, or

> *by the motion of the vessel, or its leakage; unless, by agreement, this duty is to be performed by persons employed by the shipper. In the absence of any special agreement, his duty extends to all that relates to the lading, as well as the transportation and delivery of goods; and for the faithful performance of those duties the ship is liable as well as the master and owners. . .*[63]

3. CONTRACT OF AFFREIGHTMENT

Usually a contract of carriage is preceded by a sale of goods or cargo. Generally the law that governs the contract of affreightment depends on the intention of the parties to the contract,[64] and where there is no express term in the contract as to the law governing it, this must be implied from all the relevant circumstances.[65] There is also a presumption, in contracts of carriage of goods by sea, that the contract is to be governed by the law of the ship's flag.[66] However, this presumption is rebuttable.

When a shipowner or his agent agrees to carry goods or to provide a ship for such a venture, in return for money payment, this contract is described as a contract of affreightment, and the sum paid is called the freight.[67] A contract of affreightment can be made in two forms; either in the charterparty, or the bill of lading. Although we are only concerned with bills of lading, it might be useful to briefly describe a charterparty.

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[63] Idem.

[64] Lloyd v. Guibert (1865) L.R. 1 Q.B. 115 at p. 120.

[65] Jacobs v. Credit Lyonnais (1884) 12 Q.B.D. 589 at p. 601.

[66] The Assunzione (1954) P. 150.

[67] SCRUTTON ON CHARTERPARTIES Eighteenth Edition by Mocatta, Mustill and Boyd at p. 1 (1974).

Generally a charterparty is a contract between the charterer and the shipowner (or his agent), by which the use of the ship is hired.[68] Charterparties may be divided into three types: (1) Demise or Bareboat Charter--where the possession of the vessel is completely turned-over to the charterer; (2) Time Charter--where the shipowner manages and navigates the ship but makes the vessel available to the charterer for carriage purposes for a certain length of time; (3) Voyage Charter--where the possession of the ship again remains with the owner but the vessel is engaged by the charterer to carry a full cargo on a single or round voyage.[69]

4. BILLS OF LADING

The development of the bill of lading indicates clearly how the law attempts to adapt itself to keep pace with commercial practice. In the past questions have been raised as to what was a bill of lading and there have been a number of conflicting cases as to nature and definition of a bill of lading.[70] The reason for this is historical.

4.1 General

It is generally believed that bills of lading originated during the rise of the great commercial cities of the Mediterranean in the eleventh century.[71] During that period the master of a ship was required to have with him on the voyage a clerk,[72] whose duty was to enter in a parchment book or register a record of the goods received from the shipper. The entries had to be made in the presence of the master, the shipper and a witness and the register was to be evidence of the receipt of the goods in question. It must be mentioned that statutes of various cities also provided that the clerk was to be a public official and not an agent of either the master or the shipper.[73]

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[68] Grant Gilmore and Charles L. Blacke Jr. THE LAW OF ADMIRALTY Second Edition at p. 193 (1975).

[69] SCRUTTON ON CHARTERPARTIES at pp. 4-5.

[70] Diamond Akali Export Corporation v. Bourgeois (1921) 3 K.B. 443; Stallman v. Cundill 288 Fed. 643 (1822).

During the fourteenth century a statute of an Italian city-state provided that the clerk was under an obligation to give a copy of his register entry to anyone entitled to it (even over the objections of the master). That statute also provided that a copy of the register should be left at the point of departure in the hands of a safe person in the event that should anything happen to the clerk or his register, there would still be proof of what was placed on board the vessel. This statute was said to have marked the beginnings of the development of the "bill" as distinct from the "book" of lading.[74]

In 1552 in France a statutory provision called for the clerk to enter the cargo in the shipper's book of lading and to give a copy of this to the shipper. The statute also required that the entry contain not only the descriptions of the boxes received, but also of the merchandise contained in the boxes.[75]

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[71] Gilmore and Black ADMIRALTY at p.2.

[72] William McFee THE LAW OF THE SEA at pp. 69-70 (1951).

[73] Chester McLaughlin "The Evolution of the Ocean Bill of Lading-- Yale Law Journal 548 at p. 550.

[74] Ibid., at p. 551.

An early example of a bill of lading was in the form of an indenture that was in use in 1538 [Appendix D]. Towards the end of the sixteenth century there was widespread use of a document which was defined as "the acknowledgment which the master of the ship makes of the number and quality of the goods loaded on Board."[76] A bill of lading issued in 1713 clearly shows its simplicity of form [Appendix E].

Around 1600 a statute in France defined a bill of lading as an acknowledgment, given by the master of the ship, of the number and quantity of goods loaded on board and requiring that it contain the marks of the merchandise, its condition, the name of the consignee and the amount of the freight, and that three copies of it be issued, one to the master, another forwarded by another ship to the consignee and one retained by the shipper.[77] Also, a French enactment of 1657 stated that the use of a bill of lading as evidence of certain goods were received on board was only to be made acceptable if in fact it was executed before a Notary Public or recorded in a special register. This statute could not be enforced since it placed a heavy burden on commercial activity.[78]

It must be pointed out that the courts were indeed slow to recognize bills of lading as a legal document, although there were a number of early references to them. Evans v. Martlett[79] appears to be one of the first English decisions referring to a bill of lading. It was not until the eighteenth and ninteeth centuries that bills of lading attained legal significance. In the leading case of Lickbarrow v. Mason[80], the bill of lading was recognized by the House of Lords as "the written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight . . . . The general property remains with the shipper of the goods until he has disposed of it by some act sufficient in law to transfer property. The indorsement of the bill of lading is simply a direction of the delivery of the goods."[81]

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[75] Idem.

[76] Ibid., at p. 552.

[77] Idem.

[78] Ibid., at p. 553.

Early in the nineteenth century in the United States the bill of lading began to play an important part in judicial decisions. In The Delaware[82] the U.S. Supreme Court observed:

> *Different definitions of the commercial instruments, called the bill of lading, have been given by different courts and jurists, but the correct one appears to be that it is a written acknowledgment, signed by the master, that he has received the goods therein described from the shipper, to be transported on the terms therein expressed to the described place of destination, and there to be delivered to the consignee or parties therein designated. Regularly the goods ought to be on board before the bill of lading is signed.*[83]

It can be readily seen that the bill (or for that matter the book) of lading in its original form was conclusive evidence not only that the cargo had been received by the carrier, but also that it had been loaded on to the vessel (or ought to have been on board). A bill of lading by then was generally said to have had the following characteristics: (1) it purported to be a contract for the carriage of goods on a particular ship, (2) it was a contract with the master as well as with the owner of the ship, (3) it contained the number and kind of packages and apparent condition of the merchandise, (4) it was an acknowledgment of their receipt.

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[79] (1697) 12 Mod. 156.

[80] (1787) 2 Term R. 63; (1790) 1 H.B. 357.

[81] (1790) 1 H. B. 357.

[82] 81 U.S. 779 (1871).

[83] Ibid., at p. 782.

By the mid-1800's the Industrial Revolution had made it possible to have many more ships on the oceans, which had been designed to sail faster and with the improved instruments then also available navigation was made easier. The movement of goods by sea thereby rapidly increased and shipowners were in the habit of issuing many more written contracts to shippers than before.

In England the common law rules governing shipowner's liability had been affected by legislative intervention which by 1813[84] extended to include any act, neglect, matter or thing done, occasioned or incurred without the shipowner's fault or privity. Subsequently, by the Admiralty Court Act, 1861[85] there was a limitation placed upon the amount of the carrier's liability to the shipper.

In the United States the courts began to distinguish negligence from the common law excepted perils. Thus in Clark v. Branwell[86] it was stated: "But if it can be shown that [damage to the cargo] might have been avoided by the use of proper precautionary measures, and that the usual and customary methods for this purpose have been neglected, they [the master and owner] may still be liable."[87] Also, by the Limited Liability Act, 1851[88] the shipowner's liability in the United States was also limited to the value of the vessel, but if it was lost the freight was only due.

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[84] 53 Geo. III, c. 159.

[85] 24 Vict., c. 10.

[86] 53 U.S. (12 How.) 272 (1851).

4.2 Bills of Lading Act, 1855

The preamble to the English Bills of Lading Act, 1855[89] provided that

> *Whereas, by the custom of merchants, a bill of lading of goods being transferable by endorsement, the property in the goods may hereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner; and it is expedient that such rights should pass with the property: And whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a bona fide holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden. . . .*[90]

Despite this statutory provision in Sewell v. Burdick[91] Lord Bramwell held that to "my mind there is no contract in it [i.e., bill of lading]. It is a receipt for the goods, stating the terms on which they were delivered to and received by the ship, and therefore excellent evidence of those terms, but it is not a contract."[92] While in Sanders v.

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[87] Ibid., at p. 282.

[88] Knauth at pp. 425-439.

[89] 18 & 19 Vict., c. 111.

[90] Idem.

[91] (1884) 10 App. Cas. 7.

[92] Ibid., at p. 105.

Maclean[93] Bowen L.J. stated a "cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During the period of transit and voyage, the bill of lading by the law merchant is universally recognized as its symbol, and indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo."[94] The 1855 Bills of Lading Act in section 1[95] in fact provided that the endorsee of the bill of lading to whom the property in the goods passed by reason of such endorsement, had all the rights and duties of the original shipper. Also, by section 3,[96] in the hands of the endorsee for value, the bill of lading was conclusive evidence that the goods represented by it to be shipped were actually shipped unless the holder took the bill of lading with actual notice that such goods were not on board.

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[93] (1883) 11 Q.B.D. 327.

[94] *Ibid.*, at p. 341.

[95] Section 1 states:

> Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

[96] Section 3 states:

> Every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: Provided, that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

On the other hand in the United States the courts held that delivery of cargo on board was so vital that until that had been done the carrier actually had no power to issue a bill of lading. In Pollard v. Vinton[97] it was held that before

> *. . . the power to make and deliver the bill of lading could arise, some person must have shipped the goods on the vessel. . . . We do not mean that the goods must have been actually delivered on the deck of the vessel . . . if they came within the control and custody of the officer of the boat for the purpose of shipment, the contract of carriage had commenced and the evidence of it in the nature of a bill of lading would be binding.*[98]

By 1900 large steam driven freighters were regularly plying the trade and communications had vastly improved by the advent of telegraphy. Besides expanding the volume of cargo carried, this development made it easier for the shipowners to be at constant touch with their vessels on the seas.

As previously indicated the concept of statutory limitation of liability exonerated the carrier for loss of goods in certain events and it limited the loss caused without his personal fault, independently of any bill of lading that might have been issued. However, the carriers were not content with these limitations of liability, instead they discovered the usefulness of the common law freedom described previously. Knauth observes correctly that shipowners "developed the 'free' contract to a point where it could be said the carrier accepted the goods to be carried when he liked, as he liked and whenever he liked."[99] Others have remarked that the exceptions had been extended until "there seems to be no other obligation on the shipowner than to receive the freight."[100]

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[97] 105 U.S. 7 (1881).

[98] Ibid., at p. 9.

4.3 Harter Act, 1893

But in the United States a bill of lading in such a form as described by Knauth[101] did not shield the carrier from liability, at least from the passing of the Harter Act, 1893.[102] This Act made certain important changes in the common law duties, rights and liabilities of ocean carriers. It outlawed any clause relieving the carrier from liability arising from negligence in properly loading, carrying and delivering cargo (§1 of the Act).[103] It is also outlawed any clause qualifying his duty to use due diligence to properly equip and man the vessel and make it seaworthy (§2 of the Act).[104] However, the Act also provided that if the carrier used due diligence to make his vessel seaworthy, there would be no responsibility for loss or damage resulting from fault or error in navigation or management of the vessel (§3 of the Act).[105] The Act also required the carrier to issue a bill of lading showing identification marks, the number of packages and apparent condition of the goods received, and the bill of lading would be _prima facie_ evidence of the receipt of the goods therein described (§4 of the Act).[106] Further, the Act applied to shipments from the United States and to any other foreign country and to shipment to the United States from any foreign country.[107]

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[99] Knauth THE AMERICAN LAW OF OCEAN BILLS OF LADING 4th ed. at p.116.

[100] SCRUTTON ON CHARTERPARTIES at p. 241.

[101] Knauth at pp. 116-125.

[102] 27 U.S. Stat. 445 (1893).
See, also Knauth at p. 419.

[103] Knauth at p. 419.

[104] *Ibid.*, at pp. 419-420.

[105] *Ibid.*, at p. 420.

The bill of lading by the beginning of the twentieth century could be said to have developed three distinct characteristics: (1) it was a contract for the carriage of goods, (2) it was an acknowledgment of receipt, and (3) it was a document of title.

As can readily be seen the earlier bills of lading contained little or no printed exceptions compared to the version that emerged from the late 1800's onwards. The disadvantage of this latter development was that bills of lading became complex and ambiguous instead of being simple and clear. To that extent their value as a negotiable instrument was greatly diminished. In fact bills of lading came to include stipulations to the effect that the carrier was not to be liable for his own negligence or that of his employees. Thus, where exoneration clauses were upheld by the courts the position of shipowners became virtually the reverse of that prevailing generally under universal maritime law. Instead of being absolutely liable irrespective of negligence, he enjoyed contractual exemption from liability regardless of it (the ambit of this exemption depended on the shipowner's bargaining position).[108]

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[106] _Ibid._, at pp. 420-421.

[107] _Ibid._, at p. 419.

[108] Gilmore and Black THE LAW OF ADMIRALTY Second Edition at p. 142 (1975).

Generally speaking, in what was termed as "cargo oriented" countries the views of the cargo interests largely prevailed and stricter liability was imposed upon the carriers (initially by the courts under the doctrine of public policy,[109] and subsequently by specific legislative enactments), than in what might be termed "shipowning countries" where the carriers continued to enjoy unlimited freedom of contract.[110] This situation led to general dissatisfaction since the "world was virtually divided into carriers' countries and shippers' countries."[111]

The struggle between British shipowners and cargo dispatchers, at the beginning in the United States, followed by those in Australia, New Zealand and Canada, came to a head. This led to demands for legislation "to remove the chaos and abuse produced by unlimited freedom of contract" in the latter countries.[112] The result was the enactment in the United States, as previously mentioned, of the Harter Act; in Australia of the Sea Carriage of Goods Act, 1904;[113] in New Zealand of the Shipping and Seaman Act, 1908;[114] and in Canada of the Canadian Water Act, 1910.[115]

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[109] E. Godard OUTLINES OF THE LAW OF BAILMENTS AND CARRIERS at §268-269 (1904).

[110] A. N. Yiannopoulos "The Unification of Private Maritime Law by International Conventions" 30 Law and Contemporary Problems 370.

[111] A. N. Yiannopoulos NEGLIGENCE CLAUSES IN OCEAN BILLS OF LADING at p. 4 (1962).

[112] Fletcher THE CARRIER'S LIABILITY at p. 22 (1936).

[113] SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING Eleventh Edition by Sir T. E. Scrutton and F. D. Mackinnon Appendix VI at p. 412 (1923).

[114] Ibid., at p. 414.

[115] Ibid., at p. 416.

5. THE HAGUE RULES

The need for further reform was generally felt but the shipowning countries feared the re-imposition of the concept of strict liability on their shipowners which, in their view, would have raised freight rates and thereby would have placed them at a disadvantage by comparison with others.[116] It also came to be realized that a solution would have to be based on universal agreement in order to be of any significant value to international trade.

International conferences to that end were held, first in Liverpool in 1882,[117] then in Hamburg in 1885,[118] under the auspices of the International Law Association. In 1909[119] and 1913[120] conferences under the auspices of the International Maritime Committee (CMI) were also held in Brussels.

In 1921 a conference at The Hague called by the International Law Association drafted a set rules on bills of lading.[121] In early 1922 the conference convened by the International Maritime Committee in London revised the draft Hague Rules on bills of lading to the shipowner's advantage.[122]

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[116] S. Dor BILL OF LADING CLAUSES AND THE INTERNATIONAL CONVENTION OF BRUSSELS, 1924 (Hague Rules) at p. 18 (1960).

[117] *Idem.*

[118] *Idem.*

[119] *Ibid.*, at p. 19.

[120] *Idem.*

[121] Knauth at p. 127.

[122] S. Dor *op. cit.* at p. 20.

A Diplomatic Conference held in October 1922 in Brussels, working with the draft Hague Rules, prepared a draft Convention.[123] This draft Convention was further modified in October 1923[124] and at the reconvened 1924 Brussels Diplomatic Conference the INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES OF LAW RELATING TO BILLS OF LADING (generally referred to as the Hague Rules) was approved on 24th August 1924.[125]

At the 1921 Hague Conference of the International Law Association the

> *. . . Hague Rules were drafted in the form of a uniform bill of lading, in the hope that the great shipping companies would adopt them voluntarily. . . . The shipping companies, however, were not prepared to give up their extensive immunities under the then existing laws and it became apparent that legislative action was necessary to make the uniform rules part of Bills of Lading.*[126]

Agitation for legislative action based on the Hague Rules continued in the meantime.

The Hague Rules formulated at the 1924 Brussels Conference were not conceived as a comprehensive and self-sufficient code regulating the whole of the law of carriage of goods by sea. "It was not meant altogether to supplant the contract of carriage but only to control on certain topics of freedom of contract, which the parties would otherwise have."[127] Its most important effect was that the shipowner or carrier could no longer contract out of certain defined responsibilities and was given specific rights and remedies. In summary, the 1924 Hague Rules were "based on the principle of the carrier's liability which was lessened through a system of immunities and statutory limitations."[128]

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[123] Knauth at p. 127.

[124] Idem.

[125] S. Dor op. cit. at p. 21.

[126] A. N. Yiannopoulos NEGLIGENCE CLAUSES op. cit. at p. 5.

[127] Chandris v. Isbrandtsen-Moller (1951) 1 K.B. 240 at p. 247 (per Devlin J.).

The Protocol of Signature to the 1924 Brussels Convention states that the "High Contracting Parties may give effect to this Convention either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under this Convention."[129] As a result of this most of the maritime nations have ratified or acceded to the Convention,[130] and many others without formally accepting the Convention have enacted domestic legislation based on the rules.[131]

5.1 Scope and Nature

It might be useful to observe at the outset that the Hague Rules were conceived on Anglo-American Common Law concepts as developed over a period by the courts. To that extent they have posed problems of transplantation, particularly in transposing notions such as "due diligence", "deviation", "seaworthiness" etc. into the civil law[132] and other systems.

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[128] S. Dor op. cit. at p. 20.

[129] Knauth at p. 71.

[130] PAYNE AND IVAMY'S CARRIAGE OF GOODS BY SEA Ninth Edition at p.145 (1972).

[131] W. E. Astle SHIPOWNER'S CARGO LIABILITIES AND IMMUNITIES Third Edition at pp. 420-473.

[132] R. Wolfson "The English and French Carriage of Goods by Sea Enactments" 4 International and Comparative Law Quarterly 505 at p. 511.

The rules only apply to a contract of carriage by sea which is covered by a bill of lading or similar document of title--Article I (a). In Harland and Wolff v. Burns and Laird[133] the words "covered by a bill of lading" were construed to mean any contract of affreightment, however informally made, which entitled the shipper to demand a bill of lading. The word "ship" is defined in Article I (d), while Article I (c) defines "goods" and specifically excludes deck cargo and live animals. The carriage of goods covers the period from the time when the goods are loaded on to the time when they are discharged from the ship--Article I (e). On the other hand Article VII states that the parties may enter into any agreement regarding the carrier's responsibility for the goods "prior to . . . loading on and subsequent to . . . discharge."

In Article III (2) is the central obligation that the shipowner should "properly and carefully load, handle, stow, carry, keep, care for and discharge the goods." But this is made "subject to the provisions of Article IV," which in fact means that liability for unseaworthiness is founded on the carrier's "want of due diligence" in providing a seaworthy ship. Article III (1) in fact states that the carrier is obligated before and at the beginning of the voyage to use due diligence in providing a seaworthy ship. Article III (4) states that a bill of lading issued shall be prima facie evidence of the receipt by the carrier of the cargo described in the bill of lading. Article III (6) provides one year period of limitation. Article IV (2) enumerates the "catalogue" of exemptions. Article IV (4) provides for deviation to save life or property at sea, as well as "any reasonable deviation". Article IV (5) provides for unit limitation of liability. Article V specifies that generally the rules do not apply to charter parties. Article X indicates that the rules apply to all bills of lading issued in any of the contracting States.

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[133] (1931) 40 LL.L.R. 286.

6. REVISION OF THE HAGUE RULES

This process began prior to 1959 when in the report of the CMI Sub-Committee on Conflicts of Law recommended amendment to Article X.[134] In September 1959 at the CMI Twenty-fourth Conference at Rijeka[135] this was considered and the Conference adopted a resolution calling on the Sub-Committee in its future work "to study other amendments and adaptations to the provisions of the Convention."[136] Following upon this, divergent views emerged amongst the various national maritime law associations of the CMI as to the desirability of amending the Hague Rules. Some felt that only a limited number of amendments were required so that the agreement reached in 1924 would not be upset. Others thought that a substantial revision had become necessary after some 40 years.[137]

In the meantime three British judicial decisions in 1955 (The Himalaya)[138] in 1961 (The Muncaster Castle)[139] and 1962 (Scruttons v.

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[134] Article X states: "The provisions of this Convention shall apply to all bills of lading issued in any of the Contracting States".--Knauth op. cit. at p. 430.

[135] Joseph C. Sweeney op. cit. at p. 73.

[136] CMI 24th Conference--Rijeka, 1959, Proceedings, at p. 430.

[137] Idem.

[138] Adler v. Dickson (1955) 1 Q. B.158 (called generally as The Himalaya).

[139] Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. Ltd (1961) A.C. 807 (called generally as The Muncaster Castle).

Midland Silicones)[140] had caused some consternation amongst the shipowning community and the shipping interests. It was against this background that the argument was strongly advanced that the course to be adopted should be one that did not upset the general scheme of the Hague Rules and amendments should be by way of a Protocol. This gave an impetus to the movement for a change.

At the CMI Conference of 1963 at Stockholm a draft text embodying the amendments was agreed upon and suggestions made that it be submitted to a Diplomatic Conference.[141] The general effect of the amendments was to over-rule the British decisions.[142] In 1967 and 1968 the Diplomatic Conference on Maritime Law held in Brussels examined the Stockholm draft and in fact rejected the amendment suggested in the text over-ruling the British decision in The Muncaster Castle. The final outcome was the Protocol[143] amending the Hague Rules.[144]

In the meantime following upon this, the UNCTAD Working Group received complaints to its enquiries concerning the Hague Rules, as well as a general desire for the further revision of them.[145]

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[140] Scruttons Ltd. v. Midland Silicones Ltd. (1962) A.C. 446.

[141] W. E. Astle op. cit. at pp. 154-158.

[142] R. P. Colinvaux "Revision of the Hague Rules relating to bills of lading" 1963 Journal of Business Law at p. 341.

[143] Le Droit Maritime Francais, Vol. 20, at p. 316 (1968).

[144] The Protocol comes into force when ratified by ten countries, five of which should have a fleet, sailing its own flag, of more than 1 million tons (Article XIII). As of May 1975, Norway and Sweden had ratified, while Singapore and Syria had adhered to the Protocol--Joseph C. Sweeney op. cit at p. 73.

[145] U.N. Doc. TD/B/289.

The main thrust of the criticism against the Hague Rules can best be summarized as follows:

(1) the uncertainty in the application of the laws that emerge under the Hague Rules (i.e., difficulties encountered in establishing where and how the loss or damage to the cargo occurred, the rules applying to burden of proof, the laws affecting the allocation of responsibility for loss or damage to the cargo);

(2) the uncertainties caused in the interpretation by the courts of the Hague Rules generally and particularly of terms, such as, "reasonable deviation" (Article IV (4)), "due diligence" (Article III (1)), "properly and carefully" (Article III (2)), "in any event" (Article III (6)) as well as the definitions found in Article I;

(3) the ambiguities surrounding the concept of "seaworthiness" of vessels;

(4) the unit limitation;

(5) the jurisdiction and arbitration clauses found in bills of lading;

(6) clauses in bills of lading permitting carriers to divert vessels, and to transship goods short of or beyond destination point specified in bills of lading at the expense and risk of the cargo owner;

(7) insufficient legal protection for cargoes with special characteristics requiring special stowage, etc.

(8) immunity granted the carrier under Article IV, where liability should logically be borne by him, particularly in cases like those which excuse him liability for the negligence of his servants and agents in the management and navigation of the vessel;

(9) the continued retention in bills of lading of exceptions or exoneration clause of doubtful validity, including restrictive exemptions and time limitation clauses.

It should be emphasized that national legislation incorporating the Hague Rules have not adopted a uniform text, and in some jurisdictions, where national laws permit international conventions as part of the general domestic law, there even exists a divergence between them.[146]

It might be useful to carry out a brief review of some relevant articles of the Hague Rules. The definition of "carrier" in Article I seems to raise two uncertainties, that is whether other persons such as shipping and forwarding agents who issue bills of lading are considered "carriers"; and whether the shipowner or the charterer is liable as a "carrier" when the ship has been chartered and the bill of lading contains a "demise clause".[147] Injustices have sometimes occurred when

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[146] A. Yiannopoulos "Bills of Lading and the Conflict of Laws: Validity of Negligence Clauses in France" 7 Am. J. Comp. L. 516 at pp. 520-521.

[147] "Demise clause" in a bill of lading is usually in the following form: "If the ship is not owned by or chartered by demise to the company or line by whom this bill of lading is issued (as may be the case notwithstanding anything that appears to the contrary) this bill of lading shall take effect only as a contract with the owner or demise charterer as the case may be as principal made

[Continued on next page.]

courts have held that the shipper cannot sue the owner of the vessel because he is not the "carrier", and charterers have been permitted to evade liability since they are not considered to be "carriers".[148] "Ship" is defined as any vessel used for the carriage of goods by sea. Does this cover barges and lighters when used for loading and discharging from vessels? If one applies this to the definition of "carriage of goods" which covers the period from the time when the goods are loaded to the time they are discharged[149] from the ship, it is doubtful whether barges or lighters are covered by the term "ship". Also, in the definition of "carriage of goods", the expression "from time when the goods are loaded on to the time they are discharged from the ship" is not sufficiently precise and has raised some difficulties.[150] The common practice has been to apply the Hague Rules from "tackle to tackle", which means that when the ship's tackle is used, the loading starts when the tackle is used the Hague Rules were held to usually apply when the cargo crosses the rail.[151]

[Continued from p. 294.]
through the agency of the said company or line who act as agents only and shall be under no personal liability whatsoever in respect thereof."--SCRUTTON ON CHARTERPARTIES at p. 54.

[148] Kurt Gronfors (ed.) SIX LECTURES ON THE HAGUE RULES at p. 113 (1967).

[149] Waters Trading Co. v. Dalgety & Co. (1951) 2 Lloyds Rep. 385. Wilson v. Darling Island Stevedoring and Lighterage Co. (1956) 1 Lloyds Rep. 346.

[150] Pyrene Co. v. Scindia Navigation Co. (1954) 2 Q.B. 402. Renton & Co. v. Palmyra Trading Corporation of Panama (1967) A.C. 149. Goodwin, Ferreira v. Lampert & Holt (1929) 34 Ll. L.R. 192.

[151] W. Tetley MARINE CARGO CLAIMS at p. 159 (1965). Also, see Pyrene Co. v. Scindia Navigation Co. op. cit. and Hoegh Lines v. Green Truck Sales Incorporated (1962) A.M.C. 431.

There is also the problem of the provision in Article VII which permits the carrier to contract out of liability for the period when the goods may be in his custody before loading and after discharge.[152] However, in the United States the effect of the Harter Act, it is claimed,[153] would prevent this, since section 1 of that Act provides that it shall

> *. . . not be lawful for the manager, agent, master or owner of any vessel . . . to insert in any bill of lading . . . any clause . . . whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."*[154]

Within the context of the definition of "carriage of goods", what does "loading on" and "discharged from" mean and when do the Hague Rules apply? Knauth states that there has been some controversy over this.[155] Dor maintains that:

> *As a rule, reference must be made to the custom of the respective ports to determine this period.*
>
> *The solutions most commonly admitted both by the authors and the Courts are the following:*
>
> *When the cargo is rolled or pushed from the shore or lighter into the ship by a gangway, over the ship's rail or through a side door, the loading-on occurs when the cargo passes over the ship's rail or through the ship's side door.*

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[152] K. Gronfors--Note--1960 Journal of Business Law at p. 120.

[153] Knauth at pp. 163-169.

[154] Ibid., at p. 419.

[155] Ibid., at pp. 144-147.

> *If the cargo is hoisted by a pier-side crane or a floating derrick, or if a grain elevator, a mechanical conveyor or shoveller are used, the loading-on occurs when the item of cargo is first deposited on board the ship. See Krawill v. Herd 1956, A.M.C. 2217.*
>
> *If, on the other hand, the cargo is liquid, the provisions of the Convention shall apply from the moment when the cargo flows from the shoreside chute or pipe to the ship's chute or pipe.*[156]

It is clear that cargo may be damaged or lost during the "loading on" or "discharged from" operation. Article III (3) provides that after "receiving the goods into his charge, the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading. . . ." Article III (7) states that after the "goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a 'shipped' bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same against the issue of the 'shipped' bill of lading." Do the above provisions contemplate two different types of bill of lading and consequences of liability?

It is clear that the Hague Rules seem to apply during the period described above before any bills of lading are in fact issued,[157] otherwise the provisions would be meaningless. Further, Article II and III (2) indicate that the carrier in relation to loading, carriage, custody, care and discharge of goods is subject to the responsibilities and liabilities set forth in the Hague Rules.

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[156] Dor op. cit. at p. 110

[157] Krawill v. Herd (1956) A.M.C. 2217.
Pyrene v. Scindia Steam Navigation Co. Ltd. op. cit.

It is also very clear that Article III (1) and (2) and Article IV establishes the basic framework of fault. Article III (1) binds the carrier "before and at the beginning of the voyage to exercise due diligence" to make the ship seaworthy, and to properly man, equip and supply the ship. The expression "before and at the beginning of the voyage"[158] has led to unreasonable results in many countries. Also, the term "voyage" has been interpreted as a single bill of lading voyage regardless of the number of stops the ship may make along the way. Thus, a ship takes on cargo at the port of commencement of its journey, next stops at an intermediate port to take on further cargo, and proceeds to take on further cargo at another port prior to its destination and then whilst proceeding from such a port sinks because it was unseaworthy after leaving the last port of call. In such circumstances the carrier is said to be only liable to those shippers who shipped from the last port prior to the disaster.[159]

As mentioned under the Hague Rules, the duty on the shipowner or carrier was to exercise "due diligence" to furnish a "seaworthy" vessel. It is noteworthy that the French text of the Hague Rules (which was to be the authentic text) expresses the duty as one to exercise "une diligence raisonnable"--which to some of those participating at the Diplomatic Conference was understood to amount to "reasonable" diligence rather than "due" diligence.

What is "due diligence"? The expression was previously used in Section 3 of the Harter Act; Section 5 of the Australian Sea Carriage of Goods Act, 1904; Section 300 of the New Zealand Shipping and Seamen Act, 1908 and Section 4 of the Canadian Water-Carriage Act, 1910, therefore it may be useful to see how this was interpreted by the courts prior to the Hague Rules.[160] In the United States, in The Alvena[161] "due diligence" amounted to the use of all reasonable means to make the vessel seaworthy. Similarly in the United States, in Nord-Deutscher Lloyd v. President . . . of Insurance Co. of North America[162] the duty of diligent shipowners was described as being "one of . . . vigilant anxiety and solicitude . . . to make their vessels seaworthy." Also it was held that the duty to exercise due diligence was irreducible and efforts to agree in advance by contract what conduct will constitute "due diligence" would not prevent liability.[163] Further, the owner's duty to exercise due diligence was not delegable.[164] The due diligence to make the vessel seaworthy must be exercised at the beginning of the voyage.[165]

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[158] Maxine Footwear v. Canadian Government Merchant Marine (1959) A.C. 589.

[159] The Makedonia (1962) 1 Lloyds Rep. 316.

It is stated that the

> *. . . due diligence required is due diligence in the work itself by the carrier and all persons, whether servants or agents or independent contractors whom he employs or engages in the task of making the ship seaworthy; the*

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[160] The Glenfruin (1885) 1 C.P.D. 103.
Dobell v. Rossmore S.S. Co. (1895) 2 Q.B. 428.
McFadden v. Blue Star Line (1905) 1 K.B. 697.

[161] 79 F. 973 (1897).

[162] 110 F. 420 (1901).

[163] Philippine Refining Corporation v. United States 27 F. 2d 134 (1928).

[164] International Navigation Co. v. Farr & Bailey Manufacturing Co. 181 U.S. 218 (1901).

[165] The Willdomino 300 Fed. Rep. 5 (1924).

> *carrier does not, therefore, discharge the burden of proving that due diligence has been exercised by proof that he engaged competent experts to perform and supervise the task of making the ship seaworthy.*[166] *The statute imposes an inescapable personal obligation.*[167]

The "standard" required to exercise due diligence has been described as equivalent to the common law duty of care.[168] The question whether the shipowner's conduct has satisfied the requirement of due diligence and what tests ought reasonably be made are all questions of fact.[169]

In Article III (6) is the provision of the one year period of limitation,[170] while Article IV (2) enumerates the "catalogue of exemptions" numbering a total of seventeen items.[171] Sjur Breakhus maintains that Article IV (2) (q) rule is the most general of them and in fact determines the extreme limit of the carrier's liability.[172] He formulates this principal rule in the following manner: "(1) liability for loss of or damage to cargo can be imposed on the carrier only if the loss or damage has been caused or contributed to by a negligent act or omission of the carrier, his agents or servants, or, for the sake of brevity, by culpa on the part of the carrier, but (2) the burden of proof as to whether there has been such culpa on the part of the carrier or not rests on the carrier." According to him "from the carrier's liability for the culpa of his servants has been cut away a wide sector" (the so-called liability for nautical faults),[173] the most important being Article IV (2) (a)--act or neglect in the navigation or in the management of the ship; Article IV (2) (b)--fire; as well as Article IV (5)--unit limitation. In Article IV (4) is the provision dealing with deviation to save life or property at sea, as well as for "any reasonable deviation".[174] As for the word "reasonable", Dor maintains that in this connection it is incapable of precise definition and goes on to state that "as there is no indication of the proper test to apply, the Courts of different countries may admit a different solution for a similar case."[175]

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[166] The Muncaster Castle op. cit.
Union of India v. N.V. Reederij Amsterdam (generally called The Amstelslot) (1962) 1 Lloyds Rep. 55, (1963) 2 Lloyds Rep. 223.

[167] SCRUTTON ON CHARTERPARTIES at p. 422.

[168] Union of India v. N. V. Reederij op. cit. at p. 235.

[169] Shade v. National Surety Corporation 288 F. 2d 106 (1961).

[170] R. P. Colinvaux "The 'Time Bar' of the Hague Rules" 1964 Journal of Business Law 171.

[171] Knauth at pp. 50-52.

[172] Sjur Braekhus "The Hague Rules Catalogue" in K. Gronfors (ed.) SIX LECTURES op. cit. at p. 17.

Article IV (5) provides for unit limitation of liability.[176] Erling Selvig holds that this is composed of two elements: the stipulated amount, and the quantitive unit of the goods by which to calculate the carrier's maximum liability.[177] According to him as a matter of legal interpretation only the question of the proper unit of calculation has

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[173] Idem.

[174] Knauth at p. 53.

[175] Dor at p. 48.

[176] E. Selvig UNIT LIMITATION OF CARRIER'S LIABILITY at pp. 15-22; 35-78 and 194-206.

[177] E. Selvig "Unit Limitation and Alternative Types of Limitation of Carrier's Liability" in K. Grofors (ed.) SIX LECTURES op. cit. p. 109.

has proved difficulties.[178]

In addition, the definition of "goods" exclude deck cargoes and live animals. This means that carriers may contract out of liability for such cargoes by means of exemption clauses in the bills of lading. Since large quantities of cargo are in fact carried on deck as well as live animals (particularly exports of timber and livestock from developing countries) this works to the benefit of the carrier. Further, the large increase in container traffic (which is also carried on deck) also emphasizes the importance of deck cargo.

Further two problems generally continue to arise--the persistent uncertainty as to the applicability of the Hague Rules to loss or damage occuring during loading on and discharging activities; as well as to the discontent over the fact that the Hague Rules may not cover loss or damage that occurs prior to loading on or subsequent to discharge.

It is also clear that in looking at the Hague Rules the criteria to be followed should be that of trying to balance the equities between the carrier and the cargo owner; the removal of legal ambiguities where they exist and looking at the special interests of the developing countries. Applying this to the commercial aspects, particularly of the bill of lading (to see if it satisfies the expectation of the seller, the carrier, and the buyer) it seems that the relationship between the sales contract and the bill of lading is of some importance. Usually sales contract contain terms on which they have been sold, that is, either on f.o.b. or c.i.f. or other terms. According to Gilmore and Black these terms

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[178] Idem.

> *. . . serve several functions. 1) They determine the point at which property in the goods passes from the seller to buyer, and consequently which party bears the risk of loss and what remedies are available to either party on breach by the other. 2) They determine what performance by the seller amounts to a tender which will put the buyer, who thereafter refuses to accept delivery, in breach. 3) They are a widely used means of quoting prices.*[179]

The legal ownership or possession of the goods usually can be transferred from named consignee to other persons without the need for any one to see or be in physical possession of them, for some times the goods in question are on the high seas. Ownership or possession initially is transferred when the consignee signs the bill of lading, but the document may in the interval pass to other parties till the last holder presents it to the carrier at the port of destination. The various indorsees and holders of the bill of lading are entitled legally to rely upon the "tally" and upon the statements that the cargo was "shipped in good order and condition" or "shipped in apparent good order and condition" since the shipowner is estopped from "proving that they were not in apparent good order and condition, unless it was clearly known to the indorsee or person presenting the bill of lading that the statement was untrue or is proved that he did not act upon the faith of the statement."[180]

The carriers obligation is to issue to the shipper on demand a bill of lading pursuant to Article III (3) stating the quantity and apparent condition of the goods. Also, in general they are responsible to bona fide indorsees and purchasers as is clear from what is stated above.

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[179] Gilmore and Black ADMIRALTY at p. 96.

[180] SCRUTTON ON CHARTERPARTIES op. cit. at pp. 114-115.

It is clear from the foregoing that as far as the commercial aspects of the bill of lading is concerned, the main problem concerns the status and function of it as a receipt. The Hague Rules in Article III (3) requires the carrier to mention on the bill of lading either the number of packages or pieces, or the quantity, or weight as furnished in writing by the shipper and the apparent order and condition of the goods. Article III (4) states that such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as described above in Article III (3). However, some countries in fact go so far in their national legislation as to require the carrier to answer for the quality of the goods as well (in these cases he can exempt himself from this by exoneration clauses).

Another question relates to the cost effectiveness of the bill of lading, that is what is the level of the economic cost imposed in relation to the commercial function performed, as well as on whom should such costs fall. In resolving this it is clear that the most important question is where does the risk of loss lie and who bears the cost of insuring against that risk. Cargo owners really should not need to insure against the risk of loss or damage which is covered by the provision of Article III and falls on the carrier. However, the apportionment and definition of risks and liabilities are not clearly demarcated in the Hague Rules, as well as the uncertainties relating to matter of burden of proof. The end result is that cargo owners often over-insure, lest they expose themselves to the risk for which the carrier might not compensate them. The additional insurance carried by the cargo owner invariably includes insurance against risks for which the carrier is already responsible and thus insurance policies overlap.[181]

Another cost may arise as a result of the delay that ensures in the settlement of claims, as well as the cost of arbitration and litigation. Unit limitation of liability also may impose a cost on the cargo owner since he usually has to insure for the balance not covered by the carrier.

It is clear from the foregoing that the test of cost effectiveness shows that the incidence of cost lies heavily on the cargo owners. It follows that where the parties are in different countries, the inequitable incidence of cost leads to a real income transfer between two countries. As the developing countries are basically more important as cargo owners than carriers, the current situation is unfavourable to them and leads to the transfer of real income from the poor developing countries to the rich developed shipowning nations.

The Hague Rules "preserve much of the character of the commercial law that developed prior to the nineteenth century. It is not surprising that they should be criticized by cargo interests in the modern age of transport . . . . the Hague Rules continue to carry the stamp of the national regimes which preceded them and which strongly favored the ocean carrier."[182]

As for the developing countries' objection these may be summarized as being

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[181] "cargo insurance, of course, insures against some losses for which the ship is responsible, for the cargo underwriter pays on many claims even though negligence of the ship has been a concurrent cause of the loss."--Gilmore and Black ADMIRALTY at p. 169.

[182] Stephen Zamora "Carrier Liability for Damage or Loss to Cargo in International Transport" 23 Am. J. Comp. L. 391 at pp. 418-419 (1975).

> *. . . that the allocation of risks in the Hague Rules is already slanted too much in favor of the carriers while the further protection of the unit limitation of liability together with the possibility of over-all limitation of shipowner liability*[183] *tips the balance so much in the shipowner's favor that it must necessarily have affected the cost of insurance,*[184] *although no compensation is given by way of lower freight rates for shippers. It has also been argued that alteration of the balance of risks in favor of shippers should not lead to additional costs of operations for shipowners so as to lead to an increase in the freight rate.*[185]

7. UNCITRAL'S DRAFT CONVENTION ON THE CARRIAGE OF GOODS BY SEA

The present effort by the developing countries (the majority of them being cargo exporters not maritime powers) in UNCITRAL is concentrated in the widespread revision of the Hague Rules. Recently, the Working Group on International Legislation on Shipping[186] submitted a Draft Convention on the Carriage of Goods by Sea[187] [Appendix F] to UNCITRAL. The proposals made by the Working Group call for a radical revision of the liability provisions contained in the Hague Rules.

The Draft Convention replaces Articles III (1) and (2) and

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[183] International Convention for the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Seagoing Vessels, August 25, 1924--120 UNTS 125, No. 2763 (1931-1932).

[184] John D. Kimball "Shipowner's Liability and the Proposed Revision of the Hague Rules" 7 J. of Mar. L. and Commerce 217 at pp. 229-232; 240-243 (1975).

[185] John C. Sweeney op. cit. at p. 74.

[186] U.N. Doc. A/CN.9/105 (1975).

[187] U.N. Doc. A/CN.9/105, Annex (1975).

IV (1) and (2) of the Hague Rules by providing in Article 5[188] (General Rules) the responsibilities applicable to the carrier. These General Rules are affirmative in nature and liability is to be based on fault. Further the Draft Convention states that "carriage of goods" covers the period during which the goods are in the charge of the carrier at the port of loading. He is deemed to be in charge of the goods from the time the carrier has taken over the goods (Article 4 (1) and (2)).

The Draft Convention also provides for a unified rule on burden of proof (Article 5 (7)). The effect of the proposed rule expands the liability of the shipowner to cover for causes for which he is not now responsible under the Hague Rules. The shipowner's immunity for loss caused by error in navigation or management is removed. The shipowner would be liable for the negligence of the master and crew as part of his overall responsibility owed to exercise due care. However, the Draft Convention provides that if the carrier can prove that in addition to fault on his part he is able to show that there was a parallel cause for which he is not responsible, he can to that extent reduce his liability.

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[188] Draft Article 5 provides:

> "1. The carrier shall be liable for loss, damage or expense resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences.
>
> . . . . .
>
> 4. In case of fire, the carrier shall be liable, provided the claimant proves that the fire arose due to fault or negligence on the part of the carrier, his servants or agents.
>
> . . . . .
>
> 6. The carrier shall not be liable for loss, damage or delay in delivery resulting from measures to save life and from reasonable measures to save property at sea.
>
> 7. Where fault or negligence on the part of the carrier, his servants or agents, concurs with another cause to produce loss, damage or delay in delivery the carrier shall be liable only for that portion of the loss, damage or delay in delivery attributable to such fault or negligence, provided that the carrier bears the burden of proving the amount of loss, damage or delay in delivery not attributable thereto.

As mentioned previously the new General Rules of liability seem to "retain the basic characteristics of liability based on negligence with reversal of the burden of proof."[189] Although the Draft Convention simplifies carrier liability into one basic rule,

> *. . . the adoption of a general rule of negligence, expressed in terms of "reasonable" conduct, exposes the carrier to considerable uncertainty as to the consequences of its actions. What are "all measures that could reasonably be required"? Only years of case law under the new rule would provide increased certainty.*[190]

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[189] Stephen Zamora op. cit. at p. 419.

[190] Idem.

CHAPTER IX

CONCLUSION

It is to be hoped that sufficient has been said in the previous chapters of this study to demonstrate the urgency for radical changes and the necessity for satisfactory solutions to be undertaken in the area of international trade law. Mr. Justice Holmes said: "The law embodies the story of a nation's development through many centuries."[1] We have seen that the development of international commercial law for most part was founded on ancient customs and usages generally referred to as the Law Merchant, but it is clear that this was not the only source, since there were other contributions which also played a significant role in its later development.

What is required presently is a continuation of the careful review being undertaken of the existing laws applicable in the field of international commercial law. It is important to stress that in these activities there is a need for some haste. Charles de Visscher some eighteen years ago pertinently observed:

> *The hour is not one for doctrinal generalizations moving in the rhythm of a transcendental logic, or for brilliant systematizations in which intellectual ingenuity often counts for more than respect for the facts. It is rather one that challenges us to recognize the limits which in our day the dependence of international law on the historical forms of power distribution sets to its effectiveness. . . . Every renewed recognition of the foundations of power stimulates a renewal of values; every return to the realities holds promise effectiveness.*[2]

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[1] Cited in Kelso COMMERCE at p. 2.

[2] Charles de Visscher THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW at p. 365. (1967).

It needs to be emphasized nevertheless that legal principles and political factors--two major interdependent variables--have always influenced the attitudes of States in their relation _inter se_. For the new States as for the old this still has a great attraction and constitutes not only, a decisive, but also, a devisive, factor in determining their orientation towards the problems of contemporary international law. The case of international trade is no exception to this rule when we examine the attitudes of nations[3] displayed recently, more particularly during the debate leading up to the adoption by the United Nations General Assembly, initially at its Sixth Special Session, of the "Declaration on the Establishment of a New International Economic Order",[4] along with the "Programme of Action on the Establishment of a New International Economic Order",[5] and subsequently at its Twenty-nineth Session, of the "Charter of Economic Rights and Duties of States".[6]

The world's trading nations increasingly recognized that if trade is to expand under stable conditions and harmful action be avoided, then new ground rules have to be established which would receive universal recognition. To deal with such problems requires a monumental international effort. In fact, the new rules now advocated for some time by the developing countries for international adoption would alter the present legal framework. It is also clear that the new rules will have to resolve difficult substantive and procedural questions. In addition new mechanisms may have to be developed to determine international conflicts as a result of trade distortions. Coupled with this is the argument related to shortages of basic supplies and the demand that international trade rules can no longer mostly relate to the control of imports. Sir Christopher Soames, Vice-President of the Commission of the European Communities has recently stated that "[a]ccess to supplies in the world economy is now as important as access to markets, if not more so."[7] Similarly, Senator Mondale has argued that

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[3] 13 International Legal Materials at pp. 744-762 (1974).

[4] 13 I.L.M. 718.

[5] _Ibid._, at p. 720.

[6] 69 Am. J. Int'l. L. 484 (1975).

> *. . . there may be justifiable reasons for individual countries to impose export controls in legitimate short supply situations. However, the objective of such controls should be to allocate the short supplies equitably between the domestic economy and foreign purchasers and not solely to export inflation. Otherwise export controls can lead to retaliation, disruption in trade, and further disorder in the international economic system.*[8]

In fact, the United States Trade Act of 1974[9] in section 301 specifically makes reference to the problem of access to supplies. The Senate Committee on Finance when dealing with section 301 in its report stated:

> *The Committee's decision to give the power of retaliation in situations in which a foreign nation withheld supplies of needed commodities without justification complements other features of the bill directing the President to negotiate new, enforceable rules with respect to export restraints. In an*

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[7] Cited in Goshko "OPEC--From Ineptitude to World's Most Powerful Cartel" WASHINGTON POST, December 22, 1974 § A at p. 25.

[8] Walter Mondale "Beyond Detente: Toward International Economic Security" Vol. 53 FOREIGN AFFAIRS at p. 1 (October 1974).

[9] Pub. Law No. 93 - 618, 88 Stat. 2041.

> *international period characterized by widespread shortages and inflation, this is a vital aspect of trade negotiations.*[10]

It is clear from the foregoing that the Western nations are intent in expanding the rules applicable to international trade to cover more fully the problem of export restraints, particularly as it affects raw materials. Also, recently in "A Tripartite Report on Reshaping the International Economic Order" issued by the Brookings Institute the call is essentially that world

> . . . *trade policy must be guided by the principle of comparative advantage in the future, as has been increasingly the case throughout most of the postwar period, with great profit to all. For the industrialized countries, in practice, this requires free trade --without blocs- avoiding nonsensical efforts to achieve bilateral balances, combined with effective domestic policies to cushion the adjustment needs of affected industries and their labor forces. For the lower income countries, this requires free access to the markets of the industrialized countries--without full reciprocity at this stage in their development--and perhaps to each other's markets as well.*[11]

It is not to be overlooked that between 1945 to 1970, the international system was symbolized by the presence of a few very powerful States--in terms of their military power, the performance of their economies, and the extent of their overseas capital and investment and control of resources--and many very weak ones.

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[10] Senate Committee on Finance, Trade Reform Act of 1974, SENATE REPORT 1298, 93rd Congress 2nd Session 31 (1974).

[11] The Brookings Institute convened twelve economists from North America, the European Community and Japan to report on the manner in which international economic relationships should be shaped following the December 1971 Smithsonian Agreement of the I.M.F.-Brookings Institution, A Tripartite Report on Reshaping the International Economic Order at p. 13 (1972).

> . . . But throughout the period the powerful were a small numerical proportion of the international community and the rules of the system and the system itself reflected their interests and capabilities. The legal rules and the world community were thus in disequilibrium: the law accurately reflecting [the conditions then prevailing]. . . . International law [as a result came] to be perceived as a system, the parameters as well as rules of which [were] in fundamental disequilibrium, favouring the western and northern developed States over the less-developed eastern and southern nations. . . . The weaker States are no longer interested in a legal system that focuses on such things. They are interested instead in a legal system which protects against economic and cultural neo-imperialism, which promotes an equitable distribution, and consumption of world's resources and goods, and which makes multinational and supra-national industrial and financial institutions responsive and accountable even to them.[12]

Within this context, the developing countries particulary due to the current state in the world's economy have made demands for a

> . . . just and equitable relationship between the prices of raw materials, primary products, manufactured and semi-manufactured goods exported by developing countries and the prices of raw materials, primary commodities, manufactures, capital goods and equipment imported by them with the aim of bringing about sustained improvement in their unsatisfactory terms of trade and the expansion of the world economy.[13]

Similarly, in the "Programme of Action on the Establishment of a New International Economic Order" the General Assembly, while dealing with the fundamental problems of raw materials and primary commodities as related to trade and development, stated that all "efforts should be made: . . . To evolve a just and equitable relationship . . . and to work for a link between the prices of exports of developing countries and the prices of their imports from developed countries."[14]

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[12] Thomas M. Franck and Evan R. Chester--Comment--"At Arms Length: The Coming Law of Collective Bargaining in International Relations Between Equilibriated States"--15 Virginia Journal of International Law 579 at pp. 588-590 (1975).

[13] "Declaration on the Establishment of a New International Economic Order"--G. A. Res. 3201 (S-VI) para. 4(j)--13 I.L.M. at p. 718.

Law, it must be conceded, has not played a particularly creative role to date in the present international economic order. All this is in the process of change, more particularly as commodity producers among the developing countries have begun to appreciate that when they combine (just as the workers in the industrial Western countries did) they may just have the necessary power to emancipate themselves from the so-called "free" market, the rules of which have inevitably favoured the economically powerful purchasers of the developed States. The Secretary-General of UNCTAD, Gamani Corea, recently observed that in the case of basic primary commodities wholly or mainly produced in developing countries and for which world market conditions were suitable, a closer co-ordination of policies among these countries was desirable with a view to obtaining a more remunerative level of prices.[15] Undoubtedly the success of O.P.E.C. (Organization of Petroleum Exporting Countries)[16] may be a future model for other groups of developing country producers. According to Gamani Corea the international economic system has failed, over the past two decades, to transmit adequately to the developing countries the remarkable expansion which has taken place in the developed world. In his view it is desirable to create a viable, long-term institutional framework which will not only facilitate the further expansion of the world economy but facilitate its structural transformation. There is need for diversified action, greater access to markets and a new approach to the problem of commodities. Gamani Corea felt that the few commodity agreements in existence are not all functioning well nor supported by all the parties to them. He pointed out that the consumer countries might perhaps be more concerned than in the past with the need for assured supplies and for an orderly price situation, while producer countries were concerned with the need for strengthened earnings and assured markets.[17] It is within such a context that agreed solutions will in future have to be made.

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[14] G.A. Res. 3202 (S-VI) para. I.1 (d)--Ibid., at p. 722.

[15] Ursual Wasserman "Interview with Gamani Corea, Secretary-General of UNCTAD, on the Problem of Production of Primary Commodities" 9 J.W.T.L. 15 at pp. 15-16 (1975).

[16] Jahangir Amuzegar "OPEC In The Context Of The Global Power Equation" 4 Journal of International Law and Policy 221.

It might be useful to briefly outline what was intended by the "Declaration", the "Programme of Action" and the "Charter" mentioned above. The Charter was clearly meant by the General Assembly to "establish or improve norms of universal application for the development of international economic relations on a just and equitable basis."[18] The Charter further employs most peremptory language and lists sixteen principles which "shall" govern international economic relations. The plan for the new international economic order is dichotomous. "Liberalization of world trade" is to be associated with "additional benefits for the international trade of developing countries."[19] It is also envisaged that MFN treatment may have to be the rule among developed States, while "generalized preferential, non-reciprocal and non-discriminatory treatment" is to apply to the developing countries.[20] The result is that the Charter, by setting standards for all dealings in the world economy has a generalized flavour, with, according to Western critics, a "double standard"[21] carefully woven into the general framework; no single right or duty can prevail in any given situation in a way which compromises the pursuit for economic development.[22]

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[17] Ursula Wasserman, op. cit. at pp. 16-17.

[18] G.A. Res. 3082 (XXVIII) U.N. Doc. A/9030 at p. 40.

[19] G.A. Res. 3214 (XXIX) 6 November 1974, U.N. Doc.

On the other hand, the Programme of Action makes many specific recommendations like proposals for monetary reforms,[23] preferences for developing countries in shipping and insurance; refunding of customs duties collected on products from developing countries;[24] a prohibition of new investment in synthetics which compete with primary products of developing countries;[25] and the promotion of reinvestment of corporate profits in the developing countries in which they are earned.[26]

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20 Articles 26 and 19 of the Charter of Economic Rights and Duties of States--69 Am. J. Int'l. L. at pp. 491-492.

21 On the other hand, the developing countries retort can be that they have been victims of a "double standard" practised on them all along by the developed nations.

22 Article 33 (2) of the Charter in fact provides that in its application and interpretation, the provisions of the Charter are interrelated--69 Am. J. Int'l. L. at p. 493.

23 G. A. Res. 3202 (S.VI) para. II.1 and 2.--13 I.L.M. at pp. 725-727.

24 G. A. Res. 3202 (S-VI) para. I.3 (a) (vi).--Ibid., at p. 724.

25 G. A. Res. 3202 (S-VI) para. I.3 (a) (xii).--Ibid., at p. 724.

26 G. A. Res. 3202 (S-VI) para. V.(e).--Ibid., at p. 728.

In fact the proposals for international monetary reform are most detailed, including the linking of Special Drawing Rights with development assistance.[27] The Programme of Action is also concerned only basically with the problems of the developing countries. It is clear that the greater part of the anxiety for the Programme of Action was to suggest reforms that would be receptive to the immediate world economic crisis.

The immediate question as far as the developing countries are concerned is the legal effect of the General Assembly resolution[28] adopting the Charter. It is abundantly clear that the Chairman of the Working Group drafting the Charter, Jorge Casteneda, was of the view that the purpose of the Charter was to

> *. . . enunciate authentic economic rights and duties of States in the only way which it is logically possible to do so: as rights and duties of a juridical nature intended to be binding if the draft should become part of the corpus of international law . . . . [He felt the Working Group should] formulate legal, and therefore obligatory, rights and duties.*[29]

Further, the Charter should contain certain principles of a universal nature insofar as they apply to rights and duties of States. Also, he held that the Charter should strive to create new rules which would respond to the present and future needs of the world community, since merely to codify the existing international economic law "would be tantamount to defending the maintenance of the status quo, which has certainly not promoted the welfare of two-thirds of mankind."[30] Thus from the Third World's perspective the urgent call is for the immediate abandonment of the age-old "double standard"--which they claim has favoured the developed nations unduly--by redressing past inequities.[31]

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[27] G. A. Res. 3202 (S-VI) para. X.3 (g)--Ibid., at p. 734.

[28] Richard Falk "On the Quasi-Legislative Competence of the General Assembly" 60 Am. J. Int'l. L. 782 (1966).

[29] U.N. Doc. TD/B/AC.12/R.4 at p. 2.

[30] Idem.

However, at the First Session of the Working Group the United States representative expressed doubt as to the "advisability, possibility or feasibility of making the rights and duties formulated in a draft Charter legally binding on the States."[32] At its Second Session the Working Group decided to leave the question of the Charter's legal force to the General Assembly.[33] The draft Charter was considered by the Second Committee of the General Assembly and on December 6, 1974 the Second Committee resolved to submit the Charter to the General Assembly.[34] The General Assembly on December 12, 1974 adopted the Charter by a vote of 120 in favour, with 6 against (Belgium, Denmark, Federal Republic of Germany, Luxembourg, Britain and the United States) and 10 abstentions (Austria, Canada, France, Ireland, Israel, Italy, Japan, Netherlands, Norway and Spain).[35]

From the foregoing it appears that a real consensus did not develop of the various groups. However, even if it is conceded that the Charter lacks immediate legal force, it clearly demonstrates the course that future legal developments will take in this field, particularly as the so-called "double standard" for international economic practice has now been nearly universally recognized--the "double standard" provisions on trade preferences and development assistance, were in the Second Committee deliberations adopted unanimously.[36] Further, the Charter may evidence what States regard as "international custom".[37] Another factor is the concept that pertains to the quasi-legislative competence of the General Assembly--the constant use of legal obligatory language challenges the notion that General Assembly resolutions cannot be legally binding. The phrase "collective economic security for development"[38] may portend the future development of institutions not dissimilar to that applying to the sphere of collective security for peace.

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[31] G. A. Res. 3362 (S-VII) 16 September 1975--titled DEVELOPMENT AND INTERNATIONAL ECONOMIC COOPERATION--in the Preamble reaffirms the fundamental purposes of the "Declaration", "Programme", and "Charter" and "a in particular the imperative need of redressing the economic imbalance between developed and developing countries"--70 Am. J. Int'l. L. 204 (1976).

[32] Report of the Working Group on the Charter of Economic Rights and Duties of States on its First Session, U.N. Doc. TD/B/AC/12/1 at para. 19.

[33] Report of the Working Group on the Charter of Economic Rights and Duties of States on its Second Session, U.N. Doc. TD/B/AC/12/2 at p. 3.

[34] Report of the Second Committee, U.N. Doc. A/9946 at p. 26.

[35] 14 I.L.M. at p. 265.

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[36] Ibid., at pp. 263-265.

[37] For this opinion, see Judge Tanaka in the South-West Africa Cases (Ethiopia v. South Africa, Liberia v. South Africa), Second Phase I.C.J. Rep. 1966, at p. 292.

[38] Report of the Second Committee, op. cit. at p. 29.

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APPENDIX A

DECLARATION ON THE ESTABLISHMENT OF A NEW INTERNATIONAL ECONOMIC ORDER

UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 3201 (S-VI)--
May 1, 1974*

The General Assembly

Adopts the following Declaration:

DECLARATION ON THE ESTABLISHMENT OF A NEW INTERNATIONAL ECONOMIC ORDER

We, the Members of the United Nations,

Having convened a special session of the General Assembly to study for the first time the problems of raw materials and development, devoted to the consideration of the most important economic problems facing the world community,

Bearing in mind the spirit, purposes and principles of the Charter of the United Nations to promote the economic advancement and social progress of all peoples,

Solemnly proclaim our united determination to work urgently for

THE ESTABLISHMENT OF A NEW INTERNATIONAL ECONOMIC ORDER

based on equity, sovereign equality, interdependence, common interest and co-operation among all States, irrespective of their economic and social systems, which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development in peace and justice for present and future generations.

1. The greatest and most significant achievement during the last decades has been the independence from colonial and alien

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domination of a large number of peoples and nations which has enabled them to become members of the community of free peoples. Technological progress has also been made in all spheres of economic activities in the last three decades, thus providing a solid potential for improving the well-being of all peoples. However, the remaining vestiges of alien and colonial domination, foreign occupation, racial discrimination, *apartheid* and neo-colonialism in all its forms continue to be among the greatest obstacles to the full emancipation and progress of the developing countries and all the peoples involved. The benefits of technological progress are not shared equitably by all members of the international community. The developing countries, which constitute 70 per cent of the world population, account for only 30 per cent of the world's income. It has proved impossible to achieve an even and balanced development of the international community under the existing international economic order. The gap between the developed and the developing countries continues to widen in a system which was established at a time when most of the developing countries did not even exist as independent States and which perpetuates inequality.

2. The present international economic order is in direct conflict with current developments in international political and economic relations. Since 1970, the world economy has experienced a series of grave crises which have had severe repercussions, especially on the developing countries because of their generally greater vulnerability to external economic impulses. The developing world has become a powerful factor that makes its influence felt in all fields of international activity. These irreversible changes in the relationship of forces in the world necessitate the active, full and equal participation of the developing countries in the formulation and application of all decisions that concern the international community.

3. All these changes have thrust into prominence the reality of interdependence of all the members of the world community. Current events have brought into sharp focus the realization that the interests of the developed countries and the interests of the developing countries can no longer be isolated from each other; that there is close interrelationship between the prosperity of the developed countries and the growth and development of the developing countries, and that the prosperity of the international community as a whole depends upon the prosperity of its constituent parts. International co-operation for development is the shared goal and common duty of all countries. Thus the political, economic and social well-being of present and future generations depends more than ever on co-operation between all members of the international community on the basis of sovereign equality and the removal of the disequilibrium that exists between them.

4. The new international economic order should be founded on full respect for the following principles:

(a) Sovereign equality of States, self-determination of all peoples, inadmissibility of the acquisition of territories by force, territorial integrity and noninterference in the internal affairs of other States;

(b) Broadest co-operation of all the member States of the international community, based on equity, whereby the prevailing disparities in the world may be banished and prosperity secured for all;

(c) Full and effective participation on the basis of equality of all countries in the solving of world economic problems in the common interest of all countries, bearing in mind the necessity to ensure the accelerated development of all the developing countries, while devoting particular attention to the adoption of special measures in favour of the least developed, land-locked and island developing countries as well as those developing countries most seriously affected by economic crises and natural calamities, without losing sight of the interests of other developing countries;

(d) Every country has the right to adopt the economic and social system that it deems to be the most appropriate for its own development and not to be subjected to discrimination of any kind as a result;

(e) Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right;

(f) All States, territories and peoples under foreign occupation, alien and colonial domination or *apartheid* have the right to restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those States, territories and peoples;

(g) Regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries.

(h) Right of the developing countries and the peoples of territories under colonial and racial domination and foreign occupation to achieve their liberation and to regain effective control over their natural resources and economic activities;

(i) Extending of assistance to developing countries, peoples and territories under colonial and alien domination, foreign occupation, racial discriminiation or *apartheid* or which are subjected to economic, political or any other type of measures to coerce them in order to obtain from them the subordination of the exercise of their sovereign rights and to secure from them advantages of any kind, and to neo-colonialism in all its forms and which have established or are endeavouring to establish effective control over their natural resources and economic activities that have been or are still under foreign control;

(j) Just and equitable relationship between the prices of raw materials, primary products, manufactured and semi-manufactured goods exported by developing countries and the prices of raw materials, primary commodities, manufactures, capital goods and equipment imported by them with the aim of bringing about sustained improvement in their unsatisfactory terms of trade and the expansion of the world economy;

(k) Extension of active assistance to developing countries by the whole international community, free of any political or military conditions;

(l) Ensuring that one of the main aims of the reformed international monetary system shall be the promotion of the development of the developing countries and the adequate flow of real resources to them;

(m) Improving the competitiveness of natural materials facing competition from synthetic substitutes;

(n) Preferential and non-reciprocal treatment for developing countries wherever feasible, in all fields of international economic co-operation, wherever feasible;

(o) Securing favourable conditions for the transfer of financial resources to developing countries;

(p) To give to the developing countries access to the achievements of modern science and technology, to promote the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with procedures which are suited to their economies;

(q) Necessity for all States to put an end to the waste of natural resources, including food products;

(r) The need for developing countries to concentrate all their resources for the cause of development;

(s) Strengthening--through individual and collective actions--of mutual economic, trade, financial and technical co-operation among the developing countries mainly on a preferential basis;

(t) Facilitating the role which producers associations may play, within the framework of international co-operation, and in pursuance of their aims, *inter alia*, assisting in promotion of sustained growth of world economy and accelerating development of developing countries.

5. The unanimous adoption of the International Development Strategy for the Second Development Decade was an important step in the promotion of international economic co-operation on a just and equitable basis.[1] The accelerated implementation of obligations and commitments assumed by the international community within the framework of the Strategy, particularly those concerning imperative development needs of developing countries, would contribute significantly to the fulfilment of the aims and objectives of the present Declaration.

6. The United Nations as a universal organization should be capable of dealing with problems of international economic co-operation in a comprehensive manner and ensuring equally the interests of all countries. It must have an even greater role in the establishment of a new international economic order. The Charter of Economic Rights and Duties of States, for the preparation of which this Declaration will provide an additional source of inspiration, will constitute a

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[1] General Assembly Resolution 2626 (XXV).

significant contribution in this respect. All the States Members of the United Nations are therefore called upon to exert maximum efforts with a view to securing the implementation of this Declaration, which is one of the principal guarantees for the creation of better conditions for all peoples to reach a life worthy of human dignity.

7. This Declaration on the Establishment of a New International Economic Order shall be one of the most important bases of economic relations between all peoples and nations.

APPENDIX B

CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES

UNITED NATIONS GENERAL ASSEMBLY
RESOLUTION 3281 (XXIX)--December 12, 1974*

The General Assembly.

Recalling that the United Nations Conference on Trade and Development, in its resolution 45 (III) of 18 May 1972, stressed the urgency "to establish generally accepted norms to govern international relations systematically" and recognized that "it is not feasible to establish a just order and a stable world as long as the Charter to protect the rights of all countries, and in particular the developing States, is not formulated",

Recalling further that in the same resolution it was decided to establish a Working Group of governmental representatives to draw up a draft Charter of Economic Rights and Duties of States, which the General Assembly, in its resolution 3037 (XXVII) of 19 December 1972, decided should be composed of 40 Member States,

Noting that in its resolution 3082 (XXVIII) of 6 December 1973, it reaffirmed its conviction of the urgent need to establish or improve norms of universal application for the development of international economic relations on a just and equitable basis and urged the Working Group on the Charter of Economic Rights and Duties of States to complete, as the first step, in the codification and development of the matter, the elaboration of a final draft Charter of Economic Rights and Duties of States, to be considered and approved by the General Assembly at its twenty-ninth session,

Bearing in mind the spirit and terms of its resolutions 3201 (S-VI) and 3202 (S-VI) of 1 May 1974, containing the Declaration and the Programme of Action on the Establishment of a New International Economic Order, which underlined the vital importance of the Charter to be adopted by the General Assembly at its twenty-ninth session and stressed the fact that the Charter shall constitute an effective instrument towards the establishment of a new system of international economic relations based on equity, sovereign equality, and interdependence of the interests of developed and developing countires,

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*Reprinted from 14 International Legal Materials at pp. 251-265 (January, 1975).

Having examined the report of the Working Group on the Charter of Economic Rights and Duties of States on its fourth session, transmitted to the General Assembly by the Trade and Development Board at its fourteenth session,

Expressing its appreciation to the Working Group on the Charter of Economic Rights and Duties of States which, as a result of the task performed in its four sessions held between February 1973 and June 1974, assembled the elements required for the completion and adoption of the Charter of Economic Rights and Duties of States at the twenty-ninth session of the General Assembly, as previously recommended,

Adopts and solemnly proclaims the following:

PREAMBLE

The General Assembly,

Reaffirming the fundamental purposes of the United Nations, in particular, the maintenance of international peace and security, the development of friendly relations among nations and the achievement of international co-operation in solving international problems in the economic and social fields,

Affirming the need for strengthening international co-operation in these fields,

Reaffirming further the need for strengthening international co-operation for development,

Declaring that it is a fundamental purpose of this Chapter to promote the establishment of the new international economic order, based on equity, sovereign equality, interdependence, common interest and co-operation among all States, irrespective of their economic and social systems,

Desirous of contributing to the creation of conditions for:

(a) The attainment of wider prosperity among all countries and of higher standards of living for all peoples,

(b) The promotion by the entire international community of economic and social progress of all countries, especially developing countries,

(c) The encouragement of co-operation, on the basis of mutual advantage and equitable benefits for all peace-loving States which are willing to carry out the provisions of this Charter, in the economic, trade, scientific and technical fields, regardless of political, economic or social systems,

(d) The overcoming of main obstacles in the way of economic development of the developing countries,

(e) The acceleration of the economic growth of developing countries with a view to bridging the economic gap between developing and developed countries,

(f) The protection, preservation and enhancement of the environment,

Mindful of the need to establish and maintain a just and equitable economic and social order through:

(a) The achievement of more rational and equitable international economic relations and the encouragement of structural changes in the world economy,

(b) The creation of conditions which permit the further expansion of trade and intensification of economic co-operation among all nations,

(c) The strengthening of the economic independence of developing countries,

(d) The establishment and promotion of international economic relations taking into account the agreed differences in development of the developing countries and their specific needs,

Determined to promote collective economic security for development, in particular of the developing countries, with strict respect for the sovereign equality of each State and through the co-operation of the entire international community,

Considering that genuine co-operation among States, based on joint consideration of and concerted action regarding international economic problems, is essential for fulfilling the international community's common desire to achieve a just and rational development of all parts of the world,

Stressing the importance of ensuring appropriate conditions for the conduct of normal economic relations among all States, irrespective of differences in social and economic systems, and for the full respect for the rights of all peoples, as well as the strengthening of instruments of international economic co-operation as means for the consolidation of peace for the benefit of all,

Convinced of the need to develop a system of international economic relations on the basis of sovereign equality, mutual and equitable benefit and the close interrelationship of the interests of all States,

Reiterating that the responsibility for the development of every country rests primarily upon itself but that concomitant and effective international co-operation is an essential factor for the full achievement of its own development goals,

Firmly convinced of the urgent need to evolve a substantially improved system of international economic relations,

Solemnly adopts the present Charter of Economic Rights and Duties of States.

CHAPTER 1

Fundamentals of international economic relations

Economic as well as political and other relations among States shall be governed, *inter alia*, by the following principles:

(a) Sovereignty, territorial integrity and political independence of States;

(b) Sovereign equality of all States;

(c) Non-aggression;

(d) Non-intervention;

(e) Mutual and equitable benefit;

(f) Peaceful coexistence;

(g) Equal rights and self-determination of peoples;

(h) Peaceful settlement of disputes;

(i) Remedying of injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development;

(j) Fulfilment in good faith of international obligations;

(k) Respect for human rights and fundamental freedoms;

(l) No attempt to seek hegemony and spheres of influence;

(m) Promotion of international social justice;

(n) International co-operation for development;

(o) Free access to and from the sea by land-locked countries within the framework of the above principles.

CHAPTER II

Economic right and duties of States

Article 1

Every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever.

Article 2

1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.

2. Each State has the right:

(a) To regulate and exercise authority over foreign invement within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorites. No State shall be compelled to grant preferential treatment to foreign investment;

(b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State.

Every State should, with full regard for its sovereign rights, co-operate with other States in the exercise of the right set forth in this subparagraph;

(c) To nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

Article 3

In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others.

Article 4

Every State has the right to engage in international trade and other forms of economic co-operation irrespective of any differences in political, economic and social systems. No State shall be subjected to discrimination of any kind based solely on such differences. In the pursuit of international trade and other forms of economic co-operation, every State is free to choose the forms of organization of its foreign economic relations and to enter into bilateral and multilateral arrangements consistent with its international obligations and with the needs of international economic co-operation.

Article 5

All States have the right to associate in organizations of primary commodity producers in order to develop their national economies to achieve stable financing for their development, and in pursuance of their aims assisting in the promotion of sustained growth of the world economy, in particular accelerating the development of developing countries. Correspondingly all States have the duty to respect that right by refraining from applying economic and political measures that would limit it.

Article 6

It is the duty of States to contribute to the development of international trade of goods particularly by means of arrangements and by the conclusion of long-term multilateral commodity agreements, where appropriate, and taking into account the interests of producers and consumers. All States share the responsibility to promote the regular flow and access of all commercial goods traded at stable, remunerative and equitable prices, thus contributing to the equitable development of the world economy, taking into account, in particular, the interests of developing countries.

Article 7

Every State has the primary responsibility to promote the economic, social and cultural development of its people. To this end, each State has the right and the responsibility to choose its means and goals of development, fully to mobilize and use its resources, to implement progressive economic and social reforms and to ensure the full participation of its people in the process and benefits of development. All States have the duty, individually and collectively, to co-operate in order to eliminate obstacles that hinder such mobilization and use.

Article 8

States should co-operate in facilitating more rational and equitable international economic relations and in encouraging structural changes in the context of a balanced world economy in harmony with the needs and interests of all countries, especially developing countries, and should take appropriate measures to this end.

Article 9

All States have the responsibility to co-operate in the economic, social, cultural, scientific and technological fields for the promotion of economic and social progress throughout the world, especially that of the developing countries.

Article 10

All States are juridically equal and, as members of the international community, have the right to participate fully and effectively in the international decision-making process in the solution of world economic, financial and monetary problems, *inter alia*, through the appropriate international organizations in accordance with their existing and evolving rules, and to share equitably in the benefits resulting therefrom.

Article 11

All States should co-operate to strengthen and continuously improve the efficiency of international organizations in implementing measures to stimulate the general economic progress of all countries, particularly of developing countries, and therefore should co-operate to adapt them, when appropriate, to the changing needs of international economic co-operation.

Article 12

1. States have the right, in agreement with the parties concerned, to participate in subregional, regional and interregional co-operation in the pursuit of their economic and social development. All States engaged in such co-operation have the duty to ensure that the policies of those groupings to which they belong correspond to the provisions of the Charter and are outward-looking, consistent with their international obligations and with the needs of international economic co-operation and have full regard for the legitimate interests of third countries, especially developing countries.

2. In the case of groupings to which the States concerned have transferred or may transfer certain competences as regards matters that come within the scope of this Charter, its provisions shall also apply to those groupings, in regard to such matters, consistent with the responsibilities of such States as members of such groupings. Those States shall co-operate in the observance by the groupings of the provisions of this Charter.

Article 13

1. Every State has the right to benefit from the advances and developments in science and technology for the acceleration of its economic and social development.

2. All States should promote international scientific and technological co-operation and the transfer of technology, with proper regard for all legitimate interests including, *inter alia*, the rights and duties of holders, suppliers and recipients of technology. In particular, all States should facilitate: the access of developing countries to the achievements of modern science and technology, the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with procedures which are suited to their economies and their needs.

3. Accordingly, developed countries should co-operate with the developing countries in the establishment, strengthening and development of their scientific and technological infrastructures and their scientific research and technological activities so as to help to expand and transform the economies of developing countries.

4. All States should co-operate in exploring with a view to evolving further internationally accepted guidelines or regulations for the transfer of technology taking fully into account the interests of developing countries.

Article 14

Every State has the duty to co-operate in promoting a steady and increasing expansion and liberalization of world trade and an improvement in the welfare and living standards of all peoples, in particular those of developing countries. Accordingly, all States should co-operate, *inter alia*, towards the progressive dismantling of obstacles to trade and the improvement of the international framework for the conduct of world trade and, to these ends, co-ordinated efforts shall be made to solve in an equitable way the trade problems of all countries taking into account the specific trade problems of the developing countries. In this connexion, State shall take measures aimed at securing additional benefits for the international trade of developing countries so as to achieve a substantial increase in their foreign exchange earnings, the diversification of their exports, the acceleration of the rate of growth of their trade, taking into account their development needs, an improvement in the possibilities for these countries to participate in the expansion of world trade and a balance more favourable to developing countries in the sharing of the advantages resulting from this expansion, through, in the largest possible measure, a substantial improvement in the conditions of access for the products of interest to the developing countries and, wherever appropriate, measures designed to attain stable, equitable and remunerative prices for primary products.

Article 15

All States have the duty to promote the achievement of general and complete disarmament under effective international control and to utilize the resources freed by effective disarmament measures for the economic and social development of countries, allocating a substantial portion of such resources as additional means for the development needs of developing countries.

Article 16

1. It is the right and duty of all States, individually and collectively, to eliminate colonialism, *apartheid*, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination, and the economic and social consequences thereof, as a prerequisite for development. States which practice such coercive policies are economically responsible to the countries, territories and peoples affected for the restitution and full compensation for the

exploitation and depletion of, and damages to, the natural and all other resources of those countries, territories and peoples. It is the duty of all States to extend assistance to them.

2. No State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force.

Article 17

International co-operation for development is the shared goal and common duty of all States. Every State should co-operate with the efforts of developing countries to accelerate their economic and social development by providing favourable external conditions and by extending active assistance to them, consistent with their development needs and objectives, with strict respect for the sovereign equality of States and free of any conditions derogating from their sovereignty.

Article 18

Developed countries should extend, improve and enlarge the system of generalized non-reciprocal and non-discriminatory tariff preferences to the developing countries consistent with the relevant agreed conclusions and relevant decisions as adopted on this subject, in the framework of the competent international organizations. Developed countries should also give serious consideration to the adoption of other differential measures, in areas where this is feasible and appropriate and in ways which will provide special and more favourable treatment, in order to meet trade and development needs of the developing countries. In the conduct of international economic relations the developed countries should endeavour to avoid measures having a negative effect on the development of the national economies of the developing countries, as promoted by generalized tariff preferences and other generally agreed differential measures in their favour.

Article 19

With a view to accelerating the economic growth of developing countries and bridging the economic gap between developed and developing countries, developed countries should grant generalized preferential, non-reciprocal and non-discriminatory treatment to developing countries in those fields of international economic co-operation where it may be feasible.

Article 20

Developing countries, should, in their efforts to increase their over-all trade, give due attention to the possibility of expanding their trade with socialist countries, by granting to those countries conditions for trade not inferior to those granted normally to the developed market economy countries.

Article 21

Developing countries should endeavour to promote the expansion of their mutual trade and to this end, may, in accordance with the existing and evolving provisions and procedures of international agreements where applicable, grant trade preferences to other developing countries without being obliged to extend such preferences to developed countries, provided these arrangements do not constitute an impediment to general trade liberalization and expansion.

Article 22

1. All States should respond to the generally recognized or mutually agreed development needs and objectives of developing countries by promoting increased net flows of real resources to the developing countries from all sources, taking into account any obligations and commitments undertaken by the States concerned, in order to reinforce the efforts of developing countries to accelerate their economic and social development.

2. In this context, consistent with the aims and objectives mentioned above and taking into account any obligations and commitments undertaken in this regard, it should be their endeavour to increase the net amount of financial flows from official sources to developing countries and to improve the terms and conditions.

3. The flow of development assistance resources should include economic and technical assistance.

Article 23

To enhance the effective mobilization of their own resources, the developing countries should strengthen their economic co-operation and expand their mutual trade so as to accelerate their economic and social development. All countries, especially developed countries, individually as well as through the competent international organizations of which they are members, should provide appropriate and effective support and co-operation.

Article 24

All States have the duty to conduct their mutual economic relations in a manner which takes into account the interests of other countries. In particular, all States should avoid prejudicing the interests of developing countries.

Article 25

In furtherance of world economic development, the international community, especially its developed members, shall pay special attention to the particular needs and problems of the least developed among the developing countries, of land-locked developing countries and also island developing countries, with a view to helping them to overcome their particular difficulties and thus contribute to their economic and social development.

Article 26

All States have the duty to coexist in tolerance and live together in peace, irrespective of differences in political, economic, social and cultural systems, and to facilitate trade between States having different economic and social systems. International trade should be conducted without prejudice to generalized non-discriminatory and non-reciprocal preferences in favour of developing countries, on the basis of mutual advantage, equitable benefits and the exchange of most-favoured-nation treatment.

Article 27

1. Every State has the right to fully enjoy the benefits of world invisible trade and to engage in the expansion of such trade.

2. World invisible trade, based on efficiency and mutual and equitable benefit, furthering the expansion of the world economy, is the common goal of all States. The role of developing countries in world invisible trade should be enhanced and strengthened consistent with the above objectives, particular attention being paid to the special needs of developing countries.

3. All States should co-operate with developing countries in their endeavours to increase their capacity to earn foreign exchange from invisible transactions, in accordance with the potential and needs of each developing country, and consistent with the objectives mentioned above.

Article 28

All States have the duty to co-operate in achieving adjustments in the prices of exports of developing countries in relation to prices of their imports so as to promote just and equitable terms of trade for them, in a manner which is remunerative for producers and equitable for producers and consumers.

CHAPTER III

Common responsibilities towards the international community

Article 29

The sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as the resources of the area, are the common heritage of mankind. On the basis of the principles adopted by the General Assembly in resolution 2749 (XXV) of 17 December 1970, all States shall ensure that the exploration of the area and exploitation of its resources are carried out exclusively for peaceful purposes and that the benefits derived therefrom are shared equitably by all States, taking into account the particular interests and needs of developing countries; an international regime applying to the area and its resources and including appropriate international machinery to give effect to its provisions shall be established by an international treaty of a universal character, generally agreed upon.

Article 30

The protection, preservation and the enhancement of the environment for the present and future generations is the responsibility of all States. All States shall endeavour to establish their own environmental and developmental policies in conformity with such responsibility. The environmental policies of all States should enhance and not adversely affect the present and future development potential of developing countries. All States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. All States should co-operate in evolving international norms and regulations in the field of the environment.

CHAPTER IV

Final provisions

Article 31

All States have the duty to contribute to the balanced expansion of the world economy, taking duly into account the close interrelationship between the well-being of the developed countries and the growth and development of the developing countries and that the prosperity of the international community as a whole depends upon the prosperity of its constituent parts.

Article 32

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights.

Article 33

1. Nothing in the present Charter shall be construed as impairing or derogating from the provisions of the Charter of the United Nations or actions taken in pursuance thereof.

2. In their interpretation and application, the provisions of the present Charter are interrelated and each provision should be construed in the context of the other provisions.

Article 34

An item on the Charter of Economic Rights and Duties of States shall be inscribed on the agenda of the General Assembly at its thirtieth session, and thereafter on the agenda of every fifth session. In this way a systematic and comprehensive consideration of the implementation of the Charter, covering both progress achieved and any improvements and additions which might become necessary, would be carried out and appropriate measures recommended. Such consideration should take into account the evolution of all the economic, social, legal and other factors related to the principles upon which the present Charter is based and on its purpose.

APPENDIX C

INTERNATIONAL CHAMBER OF COMMERCE (ICC Publication 290)

UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS "1974 REVISION"

GENERAL PROVISIONS AND DEFINITIONS

a. These provisions and definitions and the following articles apply to all documentary credits and are binding upon all parties thereto unless otherwise expressly agreed.

b. For the purposes of such provisions, definitions and articles the expressions "documentary credit(s)" and "credit(s)" used therein mean any arrangement, however named or described, whereby a bank (the issuing bank), acting at the request and in accordance with the instructions of a customer (the applicant for the credit),

(i) is to make payment to or to the order of a third party (the beneficiary), or is to pay, accept or negotiate bills of exchange (drafts) drawn by the beneficiary, or

(ii) authorises such payments to be made or such drafts to be paid, accepted or negotiated by another bank,

against stipulated documents, provided that the terms and conditions of the credit are complied with.

c. Credits, by their nature, are separate transactions from the sales or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts.

d. Credit instructions and the credits themselves must be complete and precise.

In order to guard against confusion and misunderstanding, issuing banks should discourage any attempt by the applicant for the credit to include excessive detail.

e. The bank first entitled to exercise the option available under art. 32 (b) shall be the bank authorized to pay, accept or negotiate

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* Reprinted from 1976 Lloyd's Maritime Commercial Law Quarterly at pp. 15-28 (February 1976).

under a credit. The decision of such bank shall bind all parties concerned.

A bank is authorised to pay or accept under a credit by being specifically nominated in the credit.

A bank is authorised to negotiate under a credit either

(i) by being specifically nominated in the credit, or

(ii) by the credit being freely negotiable by any bank.

f. A beneficiary can in no case avail himself of the contractual relationships existing between banks or between the applicant for the credit and the issuing bank.

A. FORM AND NOTIFICATION OF CREDITS

Article 1

a. Credits may be either

(i) revocable, or

(ii) irrevocable.

b. All credits, therefore, should clearly indicate whether they are revocable or irrevocable.

c. In the absence of such indication the credit shall be deemed to be revocable.

Article 2

A revocable credit may be amended or cancelled at any moment without prior notice to the beneficiary. However, the issuing bank is bound to reimburse a branch or other bank to which such a credit has been transmitted and made available for payment, acceptance or negotiation, for any payment, acceptance or negotiation complying with the terms and conditions of the credit and any amendments received up to the time of payment, acceptance or negotiation made by such branch or other bank prior to receipt by it of notice of amendment or of cancellation.

Article 3

a. An irrevocable credit constitutes a definite undertaking of the issuing bank, provided that the terms and conditions of the credit are complied with:

(i) to pay, or that payment will be made, if the credit provides for payment, whether against a draft or not;

(ii) to accept drafts if the credit provides for acceptance by the issuing bank or to be responsible for their acceptance and payment at maturity if the credit provides for the acceptance of drafts drawn on the applicant for the credit or any other drawee specified in the credit;

(iii) to purchase/negotiate, without recourse to drawers and/or bona fide holders, drafts drawn by the beneficiary, at sight or at a tenor, on the applicant for the credit or on any other drawee specified in the credit, or to provide for purchase/negotiation by another bank, if the credit provides for purchase/negotiation.

b. An irrevocable credit may be advised to a beneficiary through another bank (the advising bank) without engagement on the part of that bank, but when an issuing bank authorises or requests another bank to confirm its irrevocable credit and the latter does so, such confirmation constitutes a definite undertaking of the confirming bank in addition to the undertaking of the issuing bank, provided that the terms and conditions of the credit are complied with:

(i) to pay, if the credit is payable at its own counters, whether against a draft or not, or that payment will be made if the credit provides for payment elsewhere;

(ii) to accept drafts if the credit provides for acceptance by the confirming bank, at its own counters, or to be responsible for their acceptance and payment at maturity if the credit provides for the acceptance of drafts drawn on the applicant for the credit or any other drawee specified in the credit;

(iii) to purchase/negotiate, without recourse to drawers and/or bona fide holders, drafts drawn by the beneficiary, at sight or at a tenor, on the issuing bank, or on the applicant for the credit, or on any other drawee specified in the credit, if the credit provides for purchase/negotiation.

c. Such undertakings can neither be amended nor cancelled without the agreement of all parties thereto. Partial acceptance of amendments is not effective without the agreement of all parties thereto.

Article 4

a. When an issuing bank instructs a bank by cable, telegram or telex to advise a credit, and intends the mail confirmation to be the operative credit instrument, the cable, telegram or telex must state that the credit will only be effective on receipt of such mail confirmation. In this event, the issuing bank must send the operative credit instrument (mail confirmation) and any subsequent amendments to the credit to the beneficiary through the advising bank.

b. The issuing bank will be responsible for any consequences arising from its failure to follow the procedure set out in the preceding paragraph.

c. Unless a cable, telegram or telex states "details to follow" (or words of similar effect), or states that the mail confirmation is to be the operative credit instrument, the cable, telegram or telex will be deemed to be the operative credit instrument and the issuing bank need not send the mail confirmation to the advising bank.

Article 5

When a bank is instructed by cable, telegram or telex to issue, confirm or advise a credit similar in terms to one previously established and which has been the subject of amendments, it shall be understood that the details of the credit being issued, confirmed or advised will be transmitted to the beneficiary excluding the amendments, unless, the instructions specify clearly any amendments which are to apply.

Article 6

If incomplete or unclear instructions are received to issue, confirm or advise a credit, the bank requested to act on such instructions may give preliminary notification of the credit to the beneficiary for information only and without responsibility; in this event the credit will be issued, confirmed or advised only when the necessary information has been received.

B. LIABILITIES AND RESPONSIBILITIES

Article 7

Banks must examine all documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in accordance with the terms and conditions of the credit.

Article 8

a. In documentary credit operations all parties concerned deal in documents and not in goods.

b. Payment, acceptance or negotiation against documents which appear on their face to be in accordance with the terms and conditions of a credit by a bank authorised to do so, binds the party giving the authorisation to take up the documents and reimburse the bank which has effected the payment, acceptance or negotiation.

c. If, upon receipt of the documents, the issuing bank considers that they appear on their face not to be in accordance with the terms and conditions of the credit, that bank must determine, on the basis of the documents alone, whether to claim that payment, acceptance or negotiation was not effected in accordance with the terms and conditions of the credit.

d. The issuing bank shall have a reasonable time to examine the documents and to determine as above whether to make such a claim.

e. If such claim is to be made, notice to that effect, stating the reasons therefor, must, without delay, be given by cable or other expeditious means to the bank from which the documents have been received (the remitting bank) and such notice must state that the documents are being held at the disposal of such bank or are being returned thereto.

f. If the issuing bank fails to hold the documents at the disposal of the remitting bank, or fails to return the documents to such bank, the issuing bank shall be precluded from claiming that the relative payment, acceptance or negotiation was not effected in accordance with the terms and conditions of the credit.

g. If the remitting bank draws the attention of the issuing bank to any irregularities in the documents or advises such bank that it has paid, accepted or negotiated under reserve or against a guarantee in respect of such irregularities, the issuing bank shall not thereby be relieved from any of its obligations under this article. Such guarantee or reserve concerns only the relations between the remitting bank and the beneficiary.

Article 9

Banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any documents, or for the general and/or particular conditions stipulated in the documents or superimposed thereon; nor do they assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods represented thereby, or for the good faith or acts and/or omissions, solvency, performance or standing of the consignor, the carriers or the insurers of the goods or any other person whomsoever.

Article 10

Banks assume no liability or responsibility for the consequences arising out of delay and/or loss in transit of any messages, letters or documents, or for delay, mutilation or other errors arising in the transmission of cables, telegrams or telex. Banks assume no liability or responsibility for errors in translation or interpretation of technical terms, and reserve the right to transmit credit terms without translating them.

Article 11

Banks assume no liability or responsibility for consequences arising out of the interruption of their business by acts of God, riots, civil commotions, insurrections, wars or any other causes beyond their control or by any strikes or lockouts. Unless specifically authorised, banks will not effect payment, acceptance or negotiation after expiration under credits expiring during such interruption of business.

Article 12

a. Banks utilising the services of another bank for the purpose of giving effect to the instructions of the applicant for the credit do so for the account and at the risk of the latter.

b. Banks assume no liability or responsibility should the instructions they transmit not be carried out, even if they have themselves taken the initiative in the choice of such other bank.

c. The applicant for the credit shall be bound by and liable to indemnify the banks against all obligations and responsibilities imposed by foreign laws and usages.

Article 13

A paying or negotiating bank which has been authorised to claim reimbursement from a third bank nominated by the issuing bank and which has effected such payment or negotiation shall not be required to confirm to the third bank that it has done so in accordance with the terms and conditions of the credit.

C. DOCUMENTS

Article 14

a. All instructions to issue, confirm or advise a credit must state precisely the documents against which payment, acceptance or negotiation is to be made.

b. Terms such as "first class", "well known", "qualified" and the like shall not be used to describe the issuers of any documents called for under credits and if they are incorporated in the credit terms banks will accept documents as tendered.

C.1 Documents evidencing shipment or dispatch or taking in charge (shipping documents).

Article 15

Except as stated in art. 20, the date of the Bill of Lading, or the date of any other document evidencing shipment or dispatch or taking in charge, or the date indicated in the reception stamp or by notation on any such document, will be taken in each case to be the date of shipment or dispatch or taking in charge of the goods.

Article 16

a. If words clearly indicating payment or prepayment of freight, however named or described, appear by stamp or otherwise on documents evidencing shipment or dispatch or taking in charge they will be accepted as constituting evidence of payment of freight.

b. If the words "freight pre-payable" or "freight to be prepaid" or words of similar effect appear by stamp or otherwise on such documents they will not be accepted as constituting evidence of the payment of freight.

c. Unless otherwise specified in the credit or inconsistent with any of the documents presented under the credit, banks will accept documents stating that freight or transportation charges are payable on delivery.

d. Banks will accept shipping documents bearing reference by stamp or otherwise to costs additional to the freight charges, such as costs of, or disbursements incurred in connection with, loading, unloading or similar operations, unless the conditions of the credit specifically prohibit such reference.

Article 17

Shipping documents which bear a clause on the face thereof such as "shipper's load and count" or "said by shipper to contain" or words of similar effect, will be accepted unless otherwise specified in the credit.

Article 18

a. A clean shipping document is one which bears no superimposed clause or notation which expressly declares a defective condition of the goods and/or the packaging.

b. Banks will refuse shipping documents bearing such clauses or notations unless the credit expressly states the clauses or notations which may be accepted.

C.1.1 Marine Bills of Lading

Article 19

a. Unless specifically authorised in the credit, Bills of Lading of the following nature will be rejected:

(i) Bills of Lading issued by forwarding agents,

(ii) Bills of Lading which are issued under and are subject to the conditions of a Charter-Party,

(iii) Bills of Lading covering shipment by sailing vessels.

b. However, subject to the above and unless otherwise specified in the credit, Bills of Lading of the following nature will be accepted:

(i) "Through" Bills of Lading issued by shipping companies or their agents even though they cover several modes of transport.

(ii) Short Form Bills of Lading (i.e., Bills of Lading issued by shipping companies or their agents which indicate some or all of the conditions of carriage by reference to a source or document other than the Bill of Lading).

(iii) Bills of Lading issued by shipping companies or their agents covering unitized cargoes, such as those on pallets or in containers.

Article 20

a. Unless otherwise specified in the credit, Bills of Lading must show that the goods are loaded on board a named vessel or shipped on a named vessel.

b. Loading on board a named vessel or shipment on a named vessel may be evidenced either by a Bill of Lading bearing wording indicating loading on board a named vessel or shipment on a named vessel, or by means of a notation to that effect on the Bill of Lading signed or initialled and dated by the carrier or his agent, and the date of this notation shall be regarded as the date of loading on board the named vessel or shipment on the named vessel.

Article 21

a. Unless transhipment is prohibited by the terms of the credit, Bills of Lading will be accepted which indicate that the goods will be transhipped en route, provided the entire voyage is covered by one and the same Bill of Lading.

b. Bills of Lading incorporating printed clauses stating that the carriers have the right to tranship will be accepted notwithstanding the fact that the credit prohibits transhipment.

Article 22

a. Banks will refuse a Bill of Lading stating that the goods are loaded on deck, unless specifically authorised in the credit.

b. Banks will not refuse a Bill of Lading which contains a provision that the goods may be carried on deck, provided it does not specifically state that they are loaded on deck.

C.1.2 Combined transport documents.

Article 23

a. If the credit calls for a combined transport document, i.e., one which provides for a combined transport by at least two different modes of transport, from a place at which the goods are taken in charge to a place designated for delivery, or if the credit provides for a combined transport, but in either case does not specify the form of document required and/or the issuer of such document, banks will accept such documents as tendered.

b. If the combined transport includes transport by sea the document will be accepted although it does not indicate that the goods are on board a named vessel, and although it contains a provision that the goods, if packed in a container, may be carried on deck, provided it does not specifically state that they are loaded on deck.

C.1.3 Other shipping documents, etc.

Article 24

Banks will consider a Railway or Inland Waterway Bill of Lading or Consignment Note, Counterfoil Waybill, Postal Receipt, Certificate of

Mailing, Air Mail Receipt, Air Waybill, Air Consignment Note or Air Receipt, Trucking Company Bill of Lading or any other similar document as regular when such document bears the reception stamp of the carrier or his agent, or when it bears a signature purporting to be that of the carrier or his agent.

Article 25

Where a credit calls for an attestation or certification of weight in the case of transport other than by sea, banks will accept a weight stamp or declaration of weight superimposed by the carrier on the shipping document unless the credit calls for a separate or independent certificate of weight.

C.2 Insurance documents.

Article 26

a. Insurance documents must be as specified in the credit, and must be issued and/or signed by insurance companies or their agents or by underwriters.

b. Cover notes issued by brokers will not be accepted, unless specifically authorised in the credit.

Article 27

Unless otherwise specified in the credit, or unless the insurance documents presented establish that the cover is effective at the latest from the date of shipment or dispatch or, in the case of combined transport, the date of taking the goods in charge, banks will refuse insurance documents presented which bear a date later than the date of shipment or dispatch or, in the case of combined transport, the date of taking the goods in charge, as evidenced by the shipping documents.

Article 28

a. Unless otherwise specified in the credit, the insurance document must be expressed in the same currency as the credit.

b. The minimum amount for which insurance must be effected is the CIF value of the goods concerned. However, when the CIF value of the goods cannot be determined from the documents on their face, banks will accept as such minimum amount the amount of the drawing under the credit or the amount of the relative commercial invoice, whichever is the greater.

Article 29

a. Credits should expressly state the type of insurance required and, if any, the additional risks which are to be covered. Imprecise terms such as "usual risks" or "customary risks" should not be used; however, if such imprecise terms are used, banks will accept insurance documents as tendered.

b. Failing specific instructions, banks will accept insurance cover as tendered.

Article 30

Where a credit stipulates "insurance against all risks", banks will accept an insurance document which contains any "all risks" notation or clause, and will assume no responsibility if any particular risk is not covered.

Article 31

Banks will accept an insurance document which indicates that the cover is subject to a franchise or an excess (deductible), unless it is specifically stated in the credit that the insurance must be issued irrespective of percentage.

C.3 Commercial invoices

Article 32

a. Unless otherwise specified in the credit, commercial invoices must be made out in the name of the applicant for the credit.

b. Unless otherwise specified in the credit, banks may refuse commerical invoices issued for amounts in excess of the amount permitted by the credit.

c. The description of the goods in the commercial invoice must correspond with the description in the credit. In all other documents the goods may be described in general terms not inconsistent with the description of the goods in the credit.

C.4 Other documents

Article 33

When other documents are required, such as Warehouse Receipts, Delivery Orders, Consular Invoices, Certificate of Origin of

Weight, of Quality or of Analysis, etc., and when no further definition is given, banks will accept such documents as tendered.

D. MISCELLANEOUS PROVISIONS

Quantity and amount.

Article 34

a. The words "about", "circa" or similar expressions used in connection with the amount of the credit or the quantity or the unit price of the goods are to be construed as allowing a difference not to exceed 10% more or 10% less.

b. Unless a credit stipulates that the quantity of the goods specified must not be exceeded or reduced a tolerance of 3% more or 3% less will be permissible, always provided that the total amount of the drawings does not exceed the amount of the credit. This tolerance does not apply when the credit specifies quantity in terms of a stated number of packing units or individual items.

Partial shipments

Article 35

a. Partial shipments are allowed, unless the credit specifically states otherwise.

b. Shipments made on the same ship and for the same voyage, even if the Bills of Lading evidencing shipment "on board" bear different dates and/or indicate different ports of shipment, will not be regarded as partial shipments.

Article 36

If shipment by instalments within given periods is stipulated and any instalment is not shipped within the period allowed for that instalment, the credit ceases to be available for that or any subsequent instalments, unless otherwise specified in the credit.

Expiry date

Article 37

All credits, whether revocable or irrevocable, must stipulate an expiry date for presentation of documents for payment, acceptance or negotiation, notwithstanding the stipulation of a latest date for shipment.

Article 38

The words "to", "until", "till", and words of similar import applying to the stipulated expiry date for presentation of documents for payment, acceptance or negotiation, or to the stipulated latest date for shipment, will be understood to include the date mentioned.

Article 39

a. When the stipulated expiry date falls on a day on which banks are closed for reasons other than those mentioned in art. 11, the expirty date will be extended until the first following business day.

b. The latest date for shipment shall not be extended by reason of the extension of the expiry date in accordance with this Article. Where the credit stipulates a latest date for shipment, shipping documents dated later than such stipulated date will not be accepted. If no latest date for shipment is stipulated in the credit, shipping documents dated later than the expiry date stipulated in the credit or amendments thereto will not be accepted. Documents other than the shipping documents may, however, be dated up to and including the extended expiry date.

c. Banks paying, accepting or negotiating on such extended expiry date must add to the documents their certification in the following wording: "Presented for payment (or acceptance or negotiation as the case may be) within the expiry date extended in accordance with art. 39 of the Uniform Customs.".

Shipments, loading or dispatch.

Article 40

a. Unless the terms of the credit indicate otherwise, the words "departure", "dispatch", "loading" or "sailing" used in stipulating the latest date for shipment of the goods will be understood to be synonymous with "shipment".

b. Expressions such as "prompt", "immediately", "as soon as possible" and the like should not be used. If they are used, banks will interpret them as a request for shipment within 30 days from the date on the advice of the credit to the beneficiary by the issuing bank or by an advising bank, as the case may be.

c. The expression "on or about" and similar expressions will be interpreted as a request for shipment during the period from five days before to five days after the specified date, both end days included.

Presentation.

Article 41

Notwithstanding the requirement of art. 37 that every credit must stipulate an expiry date for presentation of documents, credits must also stipulate a specified period of time after the date of issuance of the Bills of Lading or other shipping documents during which presentation of documents for payment, acceptance or negotiation must be made. If no such period of time is stipulated in the credit, banks will refuse documents presented to them later than 21 days after the date of issuance of the Bills of Lading or other shipping documents.

Acticle 42

Banks are under no obligation to accept presentation of documents outside their banking hours.

Date terms.

Article 43

The terms "first half", "second half" of a month shall be construed respectively as from the 1st to the 15th, and the 16th to the last day of each month, inclusive.

Article 44

The terms "beginning", "middle", or "end" of a month shall be construed respectively as from the 1st to the 10th, the 11th to the 20th, and the 21st to the last day of each month, inclusive.

Article 45

When a bank issuing a credit instructs that the credit be confirmed or advised as available "for one month", "for six months" or the like, but does not specify the date from which the time is to run, the confirming or advising bank will confirm or advise the credit as expiring at the end of such indicated period from the date of its confirmation or advice.

E. TRANSFER

Article 46

a. A transferable credit is a credit under which the beneficiary has the right to give instructions to the bank called upon to effect payment or acceptance or to any bank entitled to effect negotiation to make the credit available in whole or in part to one or more third parties (second beneficiaries).

b. The bank requested to effect the transfer, whether it has confirmed the credit or not, shall be under no obligation to effect such transfer except to the extent and in the manner expressly consented to by such bank, and until such bank's charges in respect of transfer are paid.

c. Bank charges in respect of transfers are payable by the first beneficiary unless otherwise specified.

d. A credit can be transferred only if it is expressly designated as "transferable" by the issuing bank. Terms such as "divisible", "fractionable", "assignable", and "transmissible" add nothing to the meaning of the term "transferable" and shall not be used.

e. A transferable credit can be transferred once only. Fractions of a transferable credit (not exceeding in the aggregate the amount of the credit) can be transferred separately, provided partial shipments are not prohibited, and the aggregate of such transfers will be considered as constituting only one transfer of the credit. The credit can be transferred only on the terms and conditions specified in the original credit, with the exception of the amount of the credit, of any unit prices stated therein, and of the period of validity or period for shipment, any or all of which may be reduced or curtailed.

Additionally, the name of the first beneficiary can be substituted for that of the applicant for the credit, but if the name of the applicant for the credit is specifically required by the original credit to appear in any document other than the invoice, such requirement must be fulfilled.

f. The first beneficiary has the right to substitute his own invoices for those of the second beneficiary, for amounts not in excess of the original amount stipulated in the credit and for the original unit prices if stipulated in the credit, and upon such substitution of invoices the first beneficiary can draw under the credit for the difference, if any, between his invoices and second beneficiary's invoices. When a credit has been transferred and the first beneficiary is to supply his own invoices in exchange for the second beneficiary's invoices but fails to do so on first demand, the paying, accepting or negotiating bank has the right to deliver to the issuing bank the documents received under the credit, including the second beneficiary's invoices, without further responsibility to the first beneficiary.

g. The first beneficiary of a transferable credit can transfer the credit to a second beneficiary in the same country or in another country unless the credit specifically states otherwise. The first beneficiary shall have the right to request that payment or negotiation be effected to the second beneficiary at the place to which the credit has been transferred, up to and including the expiry date of the original credit, and without prejudice to the first beneficiary's right subsequently to substitute his own invoices for those of the second beneficiary and to claim any difference due to him.

Article 47

The fact that a credit is not stated to be transferable shall not affect the beneficiary's rights to assign the proceeds of such credit in accordance with the provisions of the applicable law.

APPENDIX D

EARLIEST BILL OF LADING
DATED 1538*

This bylie indented made the xxij^{ti} days of October in the xxx^{ti} yere of our Sovereigne lord Kyng Henry the viiith Wytnessith that I Robert Man servant to Syr Oswald Wylstrop Knyght have delyvered to John Halmdry merchant of the Newe Castell and layd in his shyp called the Thomas of the Newe Castell xxvj^{ti} weye salt of the measure of Blythe to carye to London to Dyce Key as shortly as wynde and wether wyll sarve after days above-named and ther to delyver the sayd salt to my master his assigney or lawful attorney Also the sayd John Halmdry shalbe dyscharged and his shyp of the sayd salt after that he come to London to Dyce Key within vj lawfull workyng dayes and ther to be payde his fraight and condycon for caryeing of the sayd salt whiche is vj^{s} viij^{d} the weye for xxvj^{ti} wey takyng yn at the sald pannes of Blythe the daye above named Also the master of the shyp called Thomas Gybsom shall have a payre of hosse clothe to doo hys dylygence and hast the sayd voyage towards London And in sytnesse of truth and these premysses above-named to be fferme and stable We the seyd John Halmdry and Robert Manne hath wrytten our names with our owne handes the days above named before Myghell Bynkes of Yorke and other mor.

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* Reprinted from Selden Society SELECT PLEAS IN THE COURT OF ADMIRALTY, Volume I, at p. 61.

APPENDIX E

BILL OF LADING ISSUED IN 1713 AT BARBADOS *

SHIPPED by the Grace of God in good Order, and well conditioned by ____________________ in and upon the good Ship called the ________________ whereof is Master under God for this present Voyage ____________________ and now riding at Anchor in the ________________ and by God's Grace bound for ______________ to say *Four h. h. of rum. Being on the proper acco.t & risk of M.r. Benj.n Bronsdon merchant in Boston* being marked & numbered as in the Margent, and are to be delivered in the like good order and well conditioned, at the aforesaid Port of ________________ (the Danger of the Seas only excepted) unto ____________________ or to ________________ assigns, he or they paying Freight for the said Goods ______________ with Primage and Average accustomed. In Witness whereof the Master or Purser of the said Ship hath affirmed to three Bills of Lading, all of this tenor & date, the one of which three Bills being accomplished, the other two to stand void. And so God send the good Ship to her desired Port in Safety. *Amen.*

Dated in ______________.

(Insides and Contents unknown.)

(Signature.)

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* Reprinted from M. Bayard Crutcher "The Ocean Bill of Lading — A Study in Fossilization" 44 Tulane Law Review 697 at p. 701 (1971).

APPENDIX F

UNCITRAL'S DRAFT CONVENTION ON THE CARRIAGE OF GOODS BY SEA*

PART I. GENERAL PROVISIONS

Article 1. Definitions

In this Convention:

1. "Carrier" or "contracting carrier" means any person by whom or in whose name a contract for carriage of goods by sea has been concluded with the shipper.

2. "Actual carrier" means any person to whom the contracting carrier has entrusted the performance of all or part of the carriage of goods.

3. "Consignee" means the person entitled to take delivery of the goods.

4. "Goods" means any kind of goods, including live animals; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" include such article of transport or packaging if supplied by the shipper.

5. "Contract of carriage" means a contract whereby the carrier agrees with the shipper to carry by sea against payment of freight, specified goods from one port to another where the goods are to be delivered.

6. "Bill of lading" means a document which evidences a contract for the carriage of goods by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

Article 2. Scope of application

1. The provisions of this Convention shall be applicable to all contracts for carriage of goods by sea between ports in two different States, if:

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* Reprinted from U.N. Doc. A/CN.9/105, Annex (1975).

(a) The port of loading as provided for in the contract of carriage is located in a Contracting State, or

(b) The port of discharge as provided in the contract of carriage is located in a Contracting State, or

(c) One of the optional ports of discharge provided for in the contract of carriage is the actual port of discharge and such port is located in a Contracting State, or

(d) The bill of lading or other document evidencing the contract of carriage issued in a Contracting State, or

(e) The bill of lading or other document evidencing the contract of carriage provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.

2. The provisions of paragraph 1 of this article are applicable without regard to the nationality of the ship, the carrier, the shipper, the consignee or any other interested person.

3. A Contracting State may also apply, by its national legislation, the rules of this Convention to domestic carriage.

4. The provisions of this Convention shall not be applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention shall apply to such a bill of lading where it governs the relation between the carrier and the holder of the bill of lading.

Article 3. Interpretation of the Convention

In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity.

PART II. LIABILITY OF THE CARRIER

Article 4. Period of responsibility

1. "Carriage of goods" covers the period during which the goods are in the charge of the carrier at the port of loading, during the carriage and at the port of discharge.

2. For the purpose of paragraph 1 of this article, the carrier shall be deemed to be in charge of the goods from the time the carrier has taken over the goods until the time the carrier has delivered the goods:

(a) By handing over the goods to the consignee; or

(b) In cases when the consignee does not receive the goods, by placing them at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge; or

(c) By handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.

3. In the provisions of paragraphs 1 and 2 of this article, reference to the carrier or to the consignee shall mean, in addition to the carrier or the consignee, the servants, the agents or other persons acting pursuant to the instructions, respectively, of the carrier or the consignee.

Article 5. General rules

1. The carrier shall be liable for loss, damage or expense resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

2. Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage within the time expressly agreed upon in writing or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case.

3. The person entitled to make a claim for the loss of goods may treat the goods as lost when they have not been delivered as required by article 4 within 60 days following the expiry of the time for delivery according to paragraph 2 of this article.

4. In case of fire, the carrier shall be liable, provided the claimant proves that the fire arose due to fault or negligence on the part of the carrier, his servants or agents.

5. With respect to live animals, the carrier shall be relieved of his liability where the loss, damage or delay in delivery results from any special risks inherent in that kind of carriage. When the carrier proves that he has complied with any special instructions given him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it shall be presumed that the loss, damage or delay in delivery was so caused unless there is proof that all or a part of the loss,

damage or delay in delivery resulted from fault or negligence on the part of the carrier, his servants or agents.

6. The carrier shall not be liable for loss, damage or delay in delivery resulting from measures to save life and from reasonable measures to save property at sea.

7. Where fault or negligence on the part of the carrier, his servants or agents, concurs with another cause to produce loss, damage or delay in delivery the carrier shall be liable only for that portion of the loss, damage or delay in delivery attributable to such fault or negligence, provided that the carrier bears the burden of proving the amount of loss, damage or delay in delivery not attributable thereto.

Article 6. Limits of liability

Alternative A

1. The liability of the carrier according to the provisions of article 5 shall be limited to an amount equivalent to (...) francs per kilo of gross weight of the goods lost, damaged or delayed.

Alternative B

1. (a) The liability of the carrier for loss of or damange to goods according to the provisions of article 5 shall be limited to an amount equivalent to (...) francs per kilo of gross weight of the goods lost or damaged.

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed [double] the freight.

(c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

Alternative C

1. The liability of the carrier according to the provisions of article 5 shall be limited to an amount equivalent to (...) francs per package or other shipping unit or (...) francs per kilo of gross weight of the goods lost, damaged or delayed, whichever is the higher.

2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 of this article, the following rules shall apply:

(a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading as packed in such article of transport shall be deemed packages or shipping units. Except as aforesaid the goods in such article of transport shall be deemed one shipping unit.

(b) In cases where the article of transport itself has been lost or damaged, that article of transport shall, when not owned or otherwise supplied by the carrier, be considered one separate shipping unit.

Alternative D

1. (a) The liability of the carrier for loss of or damage to goods according to the provisions of article 5 shall be limited to an amount equivalent to (...) francs per package or other shipping unit or (...) francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed:

variation X: [double] the freight;

variation Y: An amount equivalent to (x-y) a/ francs per package or other shipping unit or (x-y) francs per kilo of gross weight of the goods delayed, whichever is the higher.

(c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 of this article, the following rules shall apply:

(a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading as packed in such article of transport shall be deemed packages or shipping units. Except as aforesaid the goods in such article of transport shall be deemed one shipping unit.

(b) In cases where the article of transport itself has been lost or damaged, that article of transport shall, when not owned or otherwise supplied by the carrier, be considered one separate shipping unit.

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a/ It is assumed that the (x-y) will represent lower limitations on liability than those established under subparagraph 1 (a).

1. (a) The liability of the carrier for loss of or damage to goods according to the provisions of article 5 shall be limited to an amount equivalent to (...) francs per package or other shipping unit or (...) francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed [double] the freight.

(c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

2. Where a container, pallet or similar article of transport is used to consolidate goods, limitation based on the package or other shipping unit shall not be applicable.

The following paragraphs apply to all alternatives:

A franc means a unit consisting of 65.5 milligrams of gold of millesimal fineness 900.

The amount referred to in paragraph 1 of this article shall be converted into the national currency of the State of the court or arbitration tribunal seized of the case on the basis of the official value of that currency by reference to the unit defined in the preceding paragraph of this article on the date of the judgement or arbitration award. If there is no such official value, the competent authority of the State concerned shall determine what shall be considered as the official value for the purposes of this Convention.

Article 7. Actions in tort

1. The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss of or damage to the goods covered by the contract of carriage, as well as of delay in delivery, whether the action be founded in contract or in tort.

2. If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

3. The aggregate of the amounts recoverable from the carrier and any persons referred to in the preceding paragraph, shall not exceed the limits of liability provided for in this Convention.

Article 8. Loss of right to limit liability

The carrier shall not be entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the damage resulted from an act or omission of the carrier, done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. Nor shall any of the servants or agents of the carrier be entitled to the benefit of such limitation of liability with respect to damage resulting from an act or omission of such servants or agents, done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

Article 9. Deck cargo

1. The carrier shall be entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper, with the usage of the particular trade or with statutory rules or regulations.

2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier shall insert in the bill of lading or other document evidencing the contract of carriage a statement to that effect. In the absence of such a statement the carrier shall have the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier shall not be entitled to invoke such an agreement against a third party who has acquired a bill of lading in good faith.

3. Where the goods have been carried on deck contrary to the provisions of paragraph 1 of this article, the carrier shall be liable for loss of or damage to the goods, as well as for delay in delivery, which results solely from the carriage on deck, in accordance with the provisions of articles 6 and 8. The same shall apply when the carrier, in accordance with paragraph 2 of this article, is not entitled to invoke an agreement for carriage on deck against a third party who has acquired a bill of lading in good faith.

4. Carriage of goods on deck contrary to express agreement for the carriage under deck shall be deemed to be an act or omission of the carrier within the meaning of article 8.

Article 10. Liability of contracting carrier and actual carrier

1. Where the contracting carrier has entrusted the performance of the carriage or part thereof to an actual carrier, the contracting carrier shall nevertheless remain responsible for the entire carriage according to the provisions of this Convention. The contracting carrier shall, in relation to the carriage performed by the actual

carrier, be responsible for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.

2. The actual carrier also shall be responsible, according to the provisions of this Convention, for the carriage performed by him. The provisions of paragraphs 2 and 3 of article 7 and of the second sentence of article 8 shall apply if an action is brought against a servant or agent of the actual carrier.

3. Any special agreement under which the contracting carrier assumes obligations not imposed by this Convention or any waiver of rights conferred by this Convention shall affect the actual carrier only if agreed by him expressly and in writing.

4. Where and to the extent that both the contracting carrier and the actual carrier are liable, their liability shall be joint and several.

5. The aggregate of the amounts recoverable from the contracting carrier, the actual carrier and their servants and agents shall not exceed the limits provided for in this Convention.

6. Nothing in this article shall prejudice any right of recourse as between the contracting carrier and the actual carrier.

Article 11. Through carriage

1. Where a contract of carriage provides that the contracting carrier shall perform only part of the carriage covered by the contract, and that the rest of the carriage shall be performed by a person other than the contracting carrier, the responsibility of the contracting carrier and of the actual carrier shall be determined in accordance with the provisions of article 10.

2. However, the contracting carrier may exonerate himself from liability for loss, damage or delay in delivery caused by events occurring while the goods are in the charge of the actual carrier, provided that the burden of proving that any such loss, damage or delay in delivery was so caused, shall rest upon the contracting carrier.

PART III. LIABILITY OF THE SHIPPER

Article 12. General rule

The shipper shall not be liable for loss or damage sustained by the carrier, the actual carrier or by the ship unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents.

Article 13. Special rules on dangerous goods

1. When the shipper hands dangerous goods to the carrier, he shall inform the carrier of the nature of the goods and indicate, if necessary, the character of the danger and the precautions to be taken. The shipper shall, whenever possible, mark or label in a suitable manner such goods as dangerous.

2. Dangerous goods may at any time be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment or compensation by him where they have been taken in charge by him without knowledge of their nature and character. Where dangerous goods are shipped without the carrier having knowledge of their nature or character, the shipper shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

3. Nevertheless, if such dangerous goods, shipped with knowledge of their nature and character, become a danger to the ship or cargo, they may in like manner be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him except with respect to general average, if any.

PART IV. TRANSPORT DOCUMENTS

Article 14. Issue of bill of lading

1. When the goods are received in the charge of the contracting carrier or the actual carrier, the contracting carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things the particulars referred to in article 15.

2. The bill of lading may be signed by a person having authority from the contracting carrier. A bill of lading signed by the master of the ship carrying the goods shall be deemed to have been signed on behalf of the contracting carrier.

Article 15. Contents of bill of lading

1. The bill of lading shall set forth among other things the following particulars:

(a) The general nature of the goods, the leading marks necessary for identification of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;

(b) the apparent condition of the goods;

(c) the name and principal place of business of the carrier;

(d) the name of the shipper;

(e) the consignee if named by the shipper;

(f) The port of loading under the contract of carriage and the date on which the goods were taken over by the carrier at the port of loading;

(g) The port of discharge under the contract of carriage;

(h) The number of originals of the bill of lading;

(i) The place of issuance of the bill of lading;

(j) The signature of the carrier or a person acting on his behalf; the signature may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if the law of the country where the bill of lading is issued so permits;

(k) The freight to the extent payable by the consignee or other indication that freight is payable by him; and

(l) The statement referred to in paragraph 3 of article 23.

2. After the goods are loaded on board, if the shipper so demands, the carrier shall issue to the shipper a "shipped" bill of lading which, in addition to the particulars required under paragraph 1 of this article shall state that the goods are on board a named ship or ships, and the date or dates of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier, the shipper shall surrender such document in exchange for the "shipped" bill of lading. The carrier may amend any previously issued document in order to meet the shipper's demand for a "shipped" bill of lading if, as amended, such document includes all the information required to be contained in a "shipped" bill of lading.

3. The absence in the bill of lading of one or more particulars referred to in this article shall not affect the validity of the bill of lading.

Article 16. Bills of Lading: reservations and evidentiary effect

1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading

on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a "shipped" bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other person shall make special note of these grounds or inaccuracies, or of the absence of reasonable means of checking.

2. When the carrier or other person issuing the bill of lading on his behalf fails to note on the bill of lading the apparent condition of the goods, he is deemed to have noted on the bill of lading that the goods were in apparent good condition.

3. Except for particulars in respect of which and to the extent to which a reservation permitted under paragraph 1 of this article has been entered:

(a) The bill of lading shall be prima facie evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and

(b) Proof to the contrary by the carrier shall not be admissible when the bill of lading has been transferred to a third party, including any consignee, who in good faith has acted in reliance on the description of the goods therein.

4. A bill of lading which does not, as provided in paragraph 1, subparagraph (k) of article 15, set forth the freight or otherwise indicate that freight shall be payable by the consignee, shall be prima facie evidence that no freight is payable by the consignee. However, proof to the contrary by the carrier shall not be admissible when the bill of lading has been transferred to a third party, including any consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.

Article 17. Guarantees by the shipper

1. The shipper shall be deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper shall indemnify the carrier against all loss, damage or expense resulting from inaccuracies of such particulars. The shipper shall remain liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity shall in no way limit his liability under the contract of carriage to any person other than the shipper.

2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss, damage or expense resulting from the issuance of the bill of lading by the carrier, or a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods, shall be void and of no

effect as against any third party, including any consignee, to whom the bill of lading has been transferred.

3. Such letter of guarantee or agreement shall be valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including any consignee, who acts in reliance on the description of the goods in the bill of lading. If in such a case, the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier shall have no right of indemnity from the shipper pursuant to paragraph 1 of this article.

4. In the case referred to in paragraph 3 of this article the carrier shall be liable, without the benefit of the limitation of liability provided for in this Convention, for any loss, damage or expense incurred by a third party, including a consignee, who has acted in reliance on the description of the goods in the bill of lading issued. [b]

Article 18. Documents other than bills of lading

When a carrier issues a document other than a bill of lading to evidence a contract of carriage, such a document shall be prima facie evidence of the taking over by the carrier of the goods as therein described.

PART V. CLAIMS AND ACTIONS

Article 19. Notice of loss, damage or delay

1. Unless notice of loss or damage, specifying the general nature of such loss or damage, be given in writing by the consignee to the carrier not later than at the time the goods are handed over to the consignee, such handing over shall be prima facie evidence of the delivery of the goods by the carrier in good condition and as described in the document of transport, if any.

2. Where the loss or damage is not apparent, the notice in writing must be given within 10 days after the completion of delivery, excluding that day.

3. The notice in writing need not be given if the state of the goods has at the time of their delivery been the subject of joint survey or inspection.

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[b] In regard to drafting changes that may be necessary, see U.N. Doc. A/CN. 105 (foot-note 17) at p. 50 (1975).

4. In the case of any actual or apprehended loss or damage the carrier and the consignee shall give all reasonable facilities to each other for inspecting and tallying the goods.

5. No compensation shall be payable for delay in delivery unless a notice has been given in writing to the carrier within 21 days from the time that the goods were handed over to the consignee.

6. If the goods have been delivered by an actual carrier, any notice given under this article to the actual carrier shall have the same effect as if it had been given to the contracting carrier.

Article 20. Limitation Perioc

1. The carrier shall be discharged from all liability whatsoever relating to carriage under this Convention unless legal or arbitral proceedings are initiated within [one year] [two years]:

(a) In the case of partial loss of or of damage to the goods, or delay, from the last day on which the carrier has delivered any of the goods covered by the contract;

(b) In all other cases, from the ninetieth day after the time the carrier has taken over the goods or, if he has not done so, the time the contract was made.

2. The day on which the period of limitation begins to run shall not be included in the period.

3. The period of limitation may be extended by a declaration of the carrier or by agreement of the parties after the cause of action has arisen. The declaration or agreement shall be in writing.

4. The provisions of paragraphs 1, 2 and 3 of this article shall apply correspondingly to any liability of the actual carrier or of any servants or agents of the carrier or the actual carrier.

5. An action for indemnity against a third person may be brought even after the expiration of the period of limitation provided for in the preceding paragraphs if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall not be less than ninety days commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.

Article 21. Jurisdiction

1. In a legal proceeding arising out of the contract of carriage the plaintiff, at his option, may bring an action in a contracting State within whose territory is situated:

(a) The principal place of business or, in the absence thereof, the ordinary residence of the defendant; or

(b) The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(c) The port of loading; or

(d) The port of discharge; or

(e) A place designated in the contract of carriage.

2. (a) Notwithstanding the preceding provisions of this article, an action may be brought before the courts of any port in a contracting State at which the carrying vessel may have been legally arrested in accordance with the applicable law of that State. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action;

(b) All questions relating to the sufficiency or otherwise of the security shall be determined by the court at the place of the arrest.

3. No legal proceedings arising out of the contract of carriage may be brought in a place not specified in paragraphs 1 and 2 of this article. The provisions which precede do not constitute an obstacle to the jurisdiction of the contracting States for provisional or protective measures.

4. (a) Where an action has been brought before a court competent under paragraphs 1 and 2 of this article or where judgement has been delivered by such a court, no new action shall be started between the same parties on the same grounds unless the judgement of the court before which the first action was brought is not enforceable in the country in which the new proceedings are brought;

(b) For the purpose of this article the institution of measures with a view to obtaining enforcement of a judgement shall not be considered as the starting of a new action;

(c) For the purpose of this article the removal of an action to a different court within the same country shall not be considered as the starting of a new action.

5. Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties after a claim under the contract of carriage has arisen, which designates the place where the claimant may bring an action, shall be effective.

Article 22. Arbitration

1. Subject to the rules of this article, parties may provide by agreement that any dispute that may arise under a contract of carriage shall be referred to arbitration.

2. The arbitration proceedings shall, at the option of the plaintiff, be instituted at one of the following places:

(a) A place in a State within whose territory is situated

(i) The port of loading or the port of discharge, or

(ii) The principal place of business of the defendant or, in the absence thereof, the ordinary resident of the defendant, or

(iii) The place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(b) Any other place designated in the arbitration clause or agreement.

3. The arbitrator or arbitration tribunal shall apply the rules of this Convention.

4. The provisions of paragraphs 2 and 3 of this article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

5. Nothing in this article shall affect the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage has arisen.

PART VI. DEROGATIONS FROM THE CONVENTION

Article 23. Contractual stipulations

1. Any stipulation of the contract of carriage or contained in a bill of lading or any other document evidencing the contract of carriage shall be null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation shall not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the carrier, or any similar clause, shall be null and void.

2. Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities and obligations under this Convention.

3. When a bill of lading or any other document evidencing the contract of carriage is issued, it shall contain a statement that the carriage is subject to the provisions of this Convention which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee.

4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the omission of the statement referred to in the preceding paragraph, the carrier shall pay compensation to the extent required in order to give the claimant full compensation in accordance with the provisions of this Convention for any loss of or damage to the goods as well as for delay in delivery. The carrier shall, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked shall be determined in accordance with the law of the court seized of the case.

Article 24. General average

Nothing in this Convention shall prevent the application of provisions in the contract of carriage or national law regarding general average. However, the rules of this Convention relating to the liability of the carrier for loss of or damage to the goods shall govern the liability of the carrier to indemnify the consignee in respect of any contribution to general average.

Article 25. Other conventions

1. This Convention shall not modify the rights or duties of the carrier, the actual carrier and their servants and agents, provided for in international conventions or national law relating to the limitation of liability of owners of seagoing ships.

2. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) Under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or

(b) By virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.

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